

No. 15059

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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PANAVIEW DOOR & WINDOW Co., a corporation,

*Appellant,*

*vs.*

REYNOLDS METALS COMPANY, a corporation,

*Appellee.*

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On Appeal From the United States District Court for the  
Southern District of California, Central Division.

Hon. Wm. C. Mathes, Judge.

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## APPELLEE'S BRIEF.

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## APPELLEE'S BRIEF.

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### Motion to Strike.

Appellee herewith respectfully moves this Honorable Court for an order striking from the record on appeal in the within cause (1) the entire exhibit set forth at pages 55 and 56 of the Transcript of Record, (2) the reference to said exhibit at page 54 of the Transcript of Record, and (3) the entire document marked for identification as Plaintiff's Exhibit 14 set forth at pages 198-207 of the Transcript of Record. Said motion is based upon the record on appeal in the within cause and the memorandum of Points and Authorities immediately following.

## Points and Authorities in Support of Motion to Strike.

In an attempt to obtain the reversal of the judgment entered below, appellant has improperly sought to influence this Court by including in the record on appeal a document alleged to have been written by an attorney on behalf of appellee, but which was not offered or received in evidence at the trial of this action. This was done even though, according to counsel's own statement [Tr. p. 54], the document was available at the time of trial. Appellee objects most strongly to the inclusion of said document in the record on appeal and to the method adopted by appellant's counsel in this regard. The circumstance of the writing of said letter, the related correspondence and the background of the situation involved are not before this Court. Appellant has adopted a most improper mode of attacking the judgment rendered by the Hon. Wm. C. Mathes, Judge—unfair both to appellee and to the trial court.

Appellee has also improperly included in the record on this appeal a document containing inadmissible hearsay declarations. [Tr. pp. 198-207.] This document was marked for identification as Plaintiff's Exhibit 14 but was not received in evidence.

The case must be tried here upon the record made at the original trial. Matters which are not before the trial court will be stricken on motion even if the matter has been included in the record on appeal by stipulation.

F. R. C. P., Rule 75(h);

*Heath v. Helmick*, 173 F. 2d 156 (9th Cir., 1949);

*Black & Yates v. Mahogany Ass'n.*, 129 F. 2d 227, 237 (3rd Cir., 1941).

## Statement of the Case.

### Introduction.

This is an action by appellant Panaview Door & Window Co., a California corporation, owned and operated by Mr. Grossman and Mr. Reznick, against appellee Reynolds Metals Company, a Delaware corporation. Appellant's complaint sought damages for breach of an alleged contract, damages for breach of an alleged confidential relation, and a permanent injunction restraining appellee from alleged unfair competition. [Tr. pp. 3-9.] Appellee's answer specifically denied the existence of the alleged contract, the existence of a confidential relation and the existence of any unfair competition. [Tr. pp. 9-11.]

The basis of appellant's claim arises out of its insistence that Paragraph 11 (contained in appellee's acknowledgment of orders for extrusions [Ex. 2; Tr. p. 92]) constitutes an agreement that the dies used by appellee in the production of such extrusions shall be used solely and exclusively for appellant. The essence of this claim is breach of contract. While relief is also sought in terms of "a confidential relationship" and "unfair competition," appellant conceded in opening argument that its real and only basis of claim depended upon the existence of a contract, a contract providing for appellant's sole and exclusive use of the dies in question. [Tr. pp. 73-74.]

Appellee contends simply that no contract, written or otherwise, ever existed whereby appellee at any time agreed to keep such dies for appellant's sole and exclusive use. With this the trial court agreed and found that no such contract ever existed. [Findings of Fact\* Par. II, Tr. p. 58.]

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\*Hereinafter abbreviated FF.

### The Parties.

In order to properly analyze and understand this action, one must at the outset consider the parties involved and the nature of the industry in which each operated.

Appellant Panaview Door & Window Co. is a California corporation engaged in the business of producing and selling, among other things, sliding glass doors. Appellant's production process consists only of the assembly and combination of various components purchased from others rather than of the actual manufacture of the parts involved. [Tr. pp. 116, 265-269.] Because of the nature of this production process, it is relatively easy for others to enter and leave the field. The business of appellant is, therefore, a very competitive one. [Tr. p. 114.] There are not only many persons engaged in the same business but also many sliding glass doors on the market, both aluminum and steel. [Tr. p. 230.] While they, of course, are not all identical, they are all similar in both design, manufacture, shape and appearance. [Tr. pp. 36-38.] The particular sliding glass door here in question is called a "Panador." It is not patented and should be distinguished from another sliding glass door produced by appellant called a "Panaview door" which is patented. [Tr. pp. 149-150.] Appellant is also engaged in producing and selling sliding windows. [Tr. p. 365.]

The "Panador" is not a unique product. [Tr. pp. 20-21, 37.] Although appellant on this appeal apparently seeks to rely upon the fact that the drawings submitted to appellee bore the mark "Patent Pending" (A. O. B. pp. 2, 20), appellant conceded at two different times at the trial of this action that no patent was in any way involved. [Tr. pp. 141-142, 150.] Appellant also con-

ceded that the elements of “palming-off,” secondary meaning and confusion in the public mind were not present and did not enter into this case. [Tr. pp. 69, 73, 78, 422, 425.]

Abraham Grossman is the president of appellant and according to his testimony, acts as appellant’s designer, engineer and production head. [Tr. pp. 93-94.] Jerry L. Reznick is the vice-president and general manager of appellant. [Tr. pp. 223-224.] Louis Pinson is the assistant secretary and assistant general manager of appellant. [Tr. p. 258.]

Appellee Reynolds Metals Company is a Delaware corporation and the second largest producer in the world of aluminum in its various forms. As such, appellee produces, among other things, aluminum extrusions. An extrusion, in its generic sense, is any item that is forced, pressed or pushed out. An aluminum extrusion is a shape which is formed by forcing a hot billet of aluminum through a die by the use of large presses. The die itself, though important in conforming the extrusion to the shape desired, is a relatively insignificant part of the total equipment used in the manufacture of aluminum extrusions. Appellee did not produce the sliding glass door here in issue or even all of its component parts. It merely manufactured certain aluminum extrusions which were sold to appellant who then combined them with other essential parts and materials in the ultimate production of a glass door. [Tr. pp. 20, 230.]

In paragraph IX of its complaint, appellant alleged that it was the universal custom in the aluminum extrusion industry that the supplier of extrusions must keep confidential all information disclosed to it by customers



and must use dies paid for by one customer only for that customer's order. [Tr. pp. 6-7.] At the trial of this action, appellant completely abandoned this contention and offered no evidence in its support. [Tr. pp. 294-295.]

The uncontroverted evidence introduced by appellee on the other hand, showed that it is the custom in the aluminum extrusion industry—a custom invariably followed by all extruders—for the extruder to manufacture shapes to the request and specification of a buyer without in any way attempting to determine whether or not a property right in the design existed in the buyer or elsewhere. It is, therefore, not unusual in the extrusion industry to find that the same shape is being sold to two or more customers without the knowledge or consent of the other. The only exception and only situation where the use of the dies is restricted to the particular buyer for whom the dies are made is in the case of classified or secret military products or highly specialized, technical or unique equipment—a situation not presented by the facts of this case. [Tr. pp. 25-27.]

### **Statement of Facts.**

For a few years prior to 1953 appellee Reynolds Metals Company did business with Glide Windows, Inc., a corporation which was then owned and operated by Mr. Grossman and Mr. Reznick. During those years, orders were placed by Glide Windows, Inc., for the manufacture of extruded shapes to be used by Glide Windows, Inc., in the production of a sliding window. In the early part of 1953, Glide Windows, Inc., was unable to pay appellee's bill for the last order of extruded shapes, and after that time no further orders were accepted by appellee from Glide Windows, Inc., because of the latter's precarious financial condition. At that time Glide Windows, Inc.,

was indebted to appellee in the sum of \$16,824.72. [Tr. p. 13.]

In support of his contention that the dies involved in the case at bar were to be used exclusively for appellant and no one else, Mr. Grossman was allowed to testify over objection with respect to the prior dealings between Glide Windows, Inc., and appellee. In this connection Mr. Grossman testified that he clearly recalled that in 1948 and while he was acting for Glide Windows, Inc., Mr. Sargeant, sales manager for appellee, told him that the dies used to produce sliding window extrusions would be for the exclusive use of Glide Windows, Inc. [Tr. pp. 99-101, 136-137.] This testimony proved of no value to appellant, however, since the form of written acknowledgment then used expressly provided that "all such equipment will be used exclusively for the manufacture of products for Buyer." [Ex. 5; Tr. pp. 108-110A.] As will be subsequently pointed out, no such provision existed in the acknowledgment in use between appellant and appellee in 1954. Although Mr. Grossman "clearly recalled" what Mr. Sargeant had allegedly told him in 1948, he could not remember whether he had read the acknowledgment in use in 1954. [Tr. p. 145.]

In further support of his contention, Mr. Grossman testified that in November, 1951 appellee had requested permission of Glide Windows, Inc., to use the Glide dies for another customer. Exhibits 3 and 4 were introduced to substantiate this testimony. [Tr. pp. 103-107.] Under cross-examination this testimony was completely refuted and it was shown that appellee had merely asked whether the dies should be stored or destroyed. [Tr. p. 143.] Subsequently, appellant introduced Exhibits 16 through 20 to show that appellee had previously asked permission to use Glide dies for another customer in April, 1951. [Tr. pp. 247-252.] Under questioning by the court, how-

ever, Mr. Grossman conceded that the dies involved (unlike the dies here in question) related to patented products. [Tr. pp. 250-251.] Appellant has not included any of these exhibits in the record on appeal.

In the early part of 1954, William O. Yates, the Regional General Sales Manager of appellee, called on Mr. Reznick to inquire why the long overdue account of Glide Windows, Inc., had not been paid to appellant. At the time of this call, Mr. Reznick was an officer in both Glide Windows, Inc., and appellant Panaview Door & Window Co. After discussion of the financial situation of Glide Windows, Inc., Mr. Reznick informed Mr. Yates that his new corporation, Panaview Door & Window Co., which apparently had substantial financial backing, was interested in having some extruded shapes manufactured in connection with a sliding door which it was producing and inquired whether appellee would be interested in manufacturing the extruded shapes required. Mr. Yates told Mr. Reznick that appellee would be interested in manufacturing the extruded shapes if the Glide Windows, Inc., account was either paid or some regular method for payment was established and if appellee's credit department would approve the financial statement of appellant Panaview Door & Window Co. [Tr. pp. 23-24, 307-311, 224, 226-230.]

Subsequently, Glide Windows, Inc., delivered to appellee promissory notes in the total sum of \$16,824.72, on which notes there still remains a balance due and payable of \$2,000.00. [Tr. pp. 13, 231 and 299.] Thereafter, the credit of appellant Panaview Door & Window Co. was approved by Frank K. Miles, Regional Credit Manager of appellee, on the basis of appellant's balance sheet dated December 31, 1953, showing a working capital of \$164,-174.00. [Tr. pp. 13-14.]



Sometime in April of 1954, Mr. Grossman submitted to appellee's salesman, Al Kavich, a drawing of the various parts of the "Panador" sliding glass door. [Ex. 6; Tr. pp. 457, 111-112, 118.] While Mr. Grossman admitted that he did not discuss with Mr. Kavich either the use of the dies to be made or the nature of the die charge [Tr. pp. 121, 156], Mr. Grossman claimed that he told Mr. Kavich that the information contained in the drawings should be held in strict confidence by appellee. [Tr. p. 120.] On cross-examination, however, Mr. Grossman admitted that all he told Mr. Kavich was that "Panador" was a new product and that he requested Mr. Kavich personally not to disclose to any salesman of competing companies the fact that Panaview was in the process of producing the "Panador." [Tr. p. 156.] This request was made personally to Mr. Kavich because of the highly competitive nature of the sliding door business.

At no time in any stage in the placing of appellant's order was there any indication, suggestion or discussion of any kind that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 32, 36.] The only conversation which at all relates to this is the alleged conversation between Mr. Grossman and Mr. Kavich above referred to. [Tr. p. 158.]

After the drawing was received by appellee, it was processed by appellee's Extrusion Engineering Department under the direction of O. J. Meyer, Jr., and individual detailed section drawings [Ex. 8] were made of each part. The section drawings were then approved by Mr. Grossman. [Tr. pp. 36, 125.] In order to substantiate his claim that the Panador was unique and original and, therefore, that its design was of a confidential nature, Mr. Grossman testified that he alone created the original design without copying prior art

[Tr. p. 113] and that appellee did not provide him with any design assistance whatsoever. [Tr. p. 126.] In this connection he twice testified that his original drawing [Ex. 6] was identical with the individual section drawings [Ex. 8] prepared by appellee. [Tr. pp. 126, 147-148.] Although Exhibit 8 has not been included in the record on appeal in order to substantiate appellant's claim in this respect, the record shows that Exhibit 8 was marked on its face "Revised." Mr. Grossman admitted that this was done by someone in his organization but claimed that it was done by mistake. [Tr. pp. 128-129, 156-157.]

In further rebuttal of Mr. Grossman's claim that appellee did not provide him with any design assistance, Mr. Meyer, appellee's Regional Extrusion Engineer, testified in detail concerning the modification in design and design assistance furnished by appellee. In this connection he testified that "special assembly tolerances" were added to the jamb and top rail parts [Tr. pp. 319-320, 322], that the design on the serrations was changed [Tr. p. 321], and that the design of the weatherstripping detail was changed. [Tr. pp. 322-323.] It was the opinion of Mr. Meyer that the Panador would not have assembled together if these changes had not been made. [Tr. pp. 329-330, 398-399.]

After this testimony was received in evidence, Mr. Grossman again took the stand and categorically stated that he alone was responsible for change in design of the weatherstripping detail. [Tr. pp. 384-386.] Mr. Meyer was then recalled as a witness and explained at length the modifications and changes made by appellee with respect to the design of the weatherstripping detail. [Tr. pp. 392-397.] Documentary evidence supporting the testimony of Mr. Meyer was then received in evidence. [Exs. G, H, I, J and K; Tr. pp. 458-462.]

Mr. Grossman acknowledged that assembly tolerances were necessary for the proper assembly of the Panador [Tr. pp. 122-124, 153], but testified that he did not add tolerances to his original drawing [Ex. 6] because it was customary for the supplier to add them. [Tr. pp. 380-381.] In response to questioning by the trial court, Mr. Meyer pointed out that normal commercial tolerances are usually added by the supplier but that in the case at bar special tolerances which required customer approval were necessary and that these special tolerances were added by appellee. [Tr. pp. 397-398, 319-320, 322.] Mr. Grossman admitted that this was true. [Tr. pp. 381, 384.]

In rebuttal of Mr. Grossman's claim that the Panador was unique and original, appellee introduced much evidence that the component parts of the Panador were similar to the component parts of other sliding glass doors and were similar in both shape and design to hundreds of other extrusions previously manufactured by appellee. [Tr. pp. 20-21, 36-38.] In this connection Mr. Meyer testified that part for part each component of the Panador was similar in shape and design to the components of other doors. [Tr. pp. 325-327.] Even Mr. Grossman admitted, on cross-examination, that each of the parts used in the Panador had been used in other sliding doors [Tr. pp. 150-151] and that the Panador was not so different and novel that it could not be reproduced by a third party "within the time it takes to make the dies." [Tr. p. 155.] Mr. Grossman finally contended that the Panador was unique because of its "ease of assembly in the field." [Tr. p. 153.] In so doing, Mr. Grossman acknowledged the importance of the special tolerances which had been added by appellee.

During the period from April, 1954, through December, 1954, appellant placed orders for aluminum extrusions

with appellee totaling approximately \$72,670.00. Final shipment of each of these orders has been made by appellee, the last being made on or about May 31, 1955. [Tr. pp. 13-14, 39-40.]

After the section drawings had been made and the original order for aluminum extrusions had been received, the extrusion drawing was submitted to appellee's Plant Tool and Design Department for the necessary engineering determinations, and draftings were made for the manufacture of the extrusion tools. When the tool design was completed, a tool production order, designated in appellee's plant as a "T" order, was issued releasing the tool design to the Die Manufacturing Department for the manufacture of the die, which required from one to three weeks. Thereafter, the actual manufacture of the extruded shapes was entered into the production schedule of appellee's extrusion mill. [Tr. p. 30.]

Neither when the original drawing was submitted to appellee, nor at any time during the processing of the assembly print and the making of full-scale cross-section drawings of the sliding door, was anything ever stated or said by any representative of appellant that the assembly picture or the design of the door was to be treated as confidential, classified or unique in nature. The order was placed in a routine manner and was processed by appellee in the same routine manner by which it processes thousands of other orders received by it. [Tr. pp. 31, 37.]

After each order for Panador extrusions was placed with appellee, appellee sent appellant a written acknowledgment of the order in the form of Exhibit 2. [Tr. pp. 91-92, 40.] Paragraph 11 of the "Terms and Conditions"

of these acknowledgments is the only writing relating to the production of dies by appellee for appellant. Except under appellant's interpretation of Paragraph 11, there was at no time during the entire negotiations between appellant and appellee for the production of extruded shapes by means of dies to be produced by appellee, any agreement, oral, written or otherwise, that the dies would be used solely or exclusively for the production of extruded shapes for appellant.

It was established by uncontroverted evidence at the trial of this action that when it is necessary for dies to be made to fill an extrusion order, it is the custom and usage in the extrusion industry for the manufacturer of the extrusions to make the dies which will produce the extruded shapes ordered by the buyer. The buyer does not pay for the actual cost of the dies, but rather pays only a service charge, called a "die charge." The dies remain the property of the extrusion manufacturer and in the manufacturer's possession and control at all times, and the buyer acquires only the prior right to have those dies used in the manufacture of extruded shapes when his order is in process. The dies may be used by the extrusion manufacturer at any time on other orders which require identical extrusions so long as by doing so the *use* of the dies on the buyer's order is not in any way hindered or delayed. [Tr. pp. 25-27.]

In the case at bar, appellant did not order dies from appellee. Appellant only ordered aluminum extrusions. The dies were designed, ordered and produced by appellee as part of its internal production method and as a necessary step in the fulfilling of appellant's extrusion order.



[Tr. pp. 39-40.] The actual cost of these dies was \$3,176.06 [Tr. p. 343], however, appellee charged appellant and appellant paid only \$1,430.00 for the use of these dies. [Tr. pp. 40, 262-263.]

After the production of the extruded shapes above referred to for appellant, appellant produced and placed the "Panador" on the open market for sale to the general public and on exhibit at various trade shows and meetings. [Tr. p. 156.] The door was not patented nor were any of the parts which were used in making the door. [Tr. pp. 141-142, 150.] It was, therefore, in the public domain and could be copied by anyone who wished to do so.

Windsor Manufacturing, Inc., and Windsor Supply, Inc., are two separate corporations, neither of which is a party to this action. While these corporations were not owned by the same person, Mr. C. A. McLin held the controlling interest in both. Windsor Supply, Inc., was in existence first. Subsequently Windsor Manufacturing, Inc., was created, solely as a sales organization to service the accounts of Windsor Supply, Inc., the assembly and manufacturing operations remaining the functions of Windsor Supply, Inc. Thereafter, Windsor Manufacturing, Inc., ceased operations and Windsor Supply, Inc., again took over both the sales and manufacturing operations. [Tr. pp. 183-185, 215, 360.] At the time of the trial of this action, Carl Oldenkamp was the president of Windsor Supply, Inc. [Tr. p. 159.] The changes between these corporations took place during the time period involved in this action, but for convenience the two corporations will be treated as one and will be hereinafter referred to simply as "Windsor" or "Windsor Company."

Appellee's sales organization embraces two divisions, namely, a Parts Division and a General Sales Division. The function of the Parts Division is to promote the sale of both building products and industrial parts. The function of the General Sales Division is to promote the sales of those products generally referred to as mill products as well as consumer sales, such as "Reynolds Wrap." Included in the industrial parts category are basically those items produced from blueprints, drawings or samples according to the customer's specifications, such as washing machine tubs, refrigerator parts, automotive parts, residential window parts, aluminum door parts and the like. Harry M. Sargeant is appellee's Regional General Sales Manager, Parts Division. [Tr. pp. 17-18, 337-338.]

Sometime during September 1954, Mr. Sargeant met with Raymond Gunderson, then president of Windsor, and with C. A. McLin, principal owner of Windsor. At the time of this meeting, Windsor was one of the suppliers of W. P. Fuller Co. for both sliding doors and sliding windows and appellant was one of Fuller's suppliers for both casement and sliding windows. At this meeting Messrs. Gunderson and McLin offered to purchase from appellee different aluminum materials used by Windsor in its manufacture of various products. Included were aluminum extrusions for a door that Windsor was selling to Fuller and aluminum coil stock used in the production of aluminum tile. After some negotiations, it was determined that Windsor, rather than purchasing extruded shapes only, would buy from appellee substantially all of the aluminum components necessary in the production of their sliding door, and that Windsor, using the other

component parts which it had obtained from other sources, such as hardware, bumpers, vinyl weather stripping, rollers and screws, would manufacture and package their own door. It must be emphasized that this meeting was arranged at the request of the Windsor representatives, not appellee, and that the proposals made were initiated by the Windsor representatives, not appellee. [Tr. pp. 18-19, 170.] Contrary to appellant's contention that appellee had maliciously sought to compete with appellant by selling direct to appellant's customer, both Mr. Reznick and Mr. Gunderson testified that the reason Windsor sought to purchase the required components from appellee was that appellant had refused to extend further credit to Windsor or to supply Windsor with additional sliding doors. [Tr. pp. 232, 237-238, 362-363.]

Thereafter, and in order that appellee could furnish price quotations, Windsor submitted to appellee samples of the various products for which Windsor desired extruded shapes. The sliding door that Windsor was supplying to Fuller was not the only sample submitted. Also included were samples of Windsor's tub enclosure, sliding window, shower door and shower enclosure. Price quotations were also requested on aluminum angles and aluminum coil stock. [Ex. 13; Tr. pp. 193-198, 19, 185-186.] Mr. Sargeant then prepared and submitted to Windsor quotations for each component that appellee was to supply, as well as a quotation covering the tooling costs of appellee's Parts Division located in Phoenix, Arizona. [Tr. pp. 19-20.]

After the quotations were submitted to Windsor, it placed an order with appellee for the manufacture of the aluminum components, among which were extrusions for the Windsor sliding door. [Tr. p. 20.] This order was first forwarded to appellee's Parts Division and then, sometime in November 1954, was forwarded to appellee's extrusion mill. The material required by this production



order was to be manufactured under eight new extrusion numbers, numbered 13250 through 13257, inclusive. In the processing of this production order, appellee's Extrusion Engineering Department determined that the sections called for were the same as the sections which had been produced for appellant. Accordingly, and following the normal and customary usage of appellee and of the extrusion industry generally, the existing die tools which were made for appellant under "T" orders numbered 3318 through 3325, and which had been previously used by appellee to produce extruded shapes numbered 10414 through 10421 for appellant, were used by appellee to produce the extrusions called for by the Windsor order. [Tr. pp. 25-27, 32, 40.]

The credit of Windsor was approved by Mr. Miles, appellee's credit manager, in December 1954, on the basis of Windsor's balance sheet dated November 30, 1954, showing a working capital of \$80,200.00 and a guarantee received from Associated Finance Company. [Tr. pp. 15-16, 304.] Shipments to Windsor commenced December 17, 1954. [Tr. p. 306.]

The uncontroverted evidence produced at the trial of this case shows that the entire handling of the Windsor order was done by appellee in its usual and customary manner. Throughout each step of the negotiations, the placing of orders, the approval of credit, the determination and production of tooling and dies, the manufacture of the extrusions and the shipment of the finished extrusions, appellee followed not only the custom and usages of the extrusion industry but also the same procedure it had used in processing appellant's own order. At no time did appellee reveal to Windsor any information with respect to the shape or design of appellant's sliding door, appellee's quotations and extrusions having been based on samples and specifications furnished to it by Windsor for a sliding door which had been for sale on the open

market for some months prior to its submission to appellee. [Tr. pp. 20, 30, 36-37, 363.] The extension of credit and the approval of Windsor's orders were done in the normal course of business and as a routine transaction, and were based entirely upon the financial condition of that company and its guarantor. So far as appellee was concerned, the two transactions were completely unrelated, and one had no bearing on the other. [Tr. p. 16.] When appellee ascertained that it had in stock a die which would produce the extrusion ordered by Windsor, appellee used its existing die rather than manufacture a new die to produce an identical shape. In so doing, appellee followed the normal and customary usages of the trade. [Tr. pp. 25-27, 32.] It also must be noted that appellee manufactured more than one set of dies capable of producing the extrusions here involved. [Tr. pp. 354-355.]

During the whole of the period here in question, Windsor Company purchased from appellee the component aluminum extrusions for approximately 5,000 doors [Tr. p. 182], aggregating a dollar value of \$155,624.97. [Tr. pp. 168-170.]

With respect to its third alleged cause of action relating to unfair competition, appellant attempted to show that appellee was "competing" with appellant by selling to Windsor Company. In this connection appellant contended that Windsor ordered doors from appellee in substantially the same manner as it would have ordered doors from appellant. [Tr. p. 176.] The testimony of Carl Oldenkamp, a disinterested witness, completely refuted this contention. Mr. Oldenkamp testified that all of the sliding doors purchased by Windsor from appellant were, when received from appellant, "completely marketable, ready to ship items." [Tr. pp. 217-218.] These doors were "knocked-down" (sometimes referred to as a "K D door"), which meant that all the component parts for a door except the glass were packaged together and

ready for sale to a customer. Actual installation of the door was done by the customer in the field. [Tr. p. 219.] On the other hand, appellee at no time ever furnished Windsor with either a knocked-down door, in the sense that it was ready for sale to a customer, or a completed door. Appellee sold to Windsor only a portion of the components used by Windsor in producing a sliding door, *i.e.*, aluminum extrusions. [Tr. pp. 175, 211-212, 219.] The extrusions were strapped together in bundles, each bundle containing similar extrusions, and then shipped to Windsor. [Tr. p. 175.] Some were raw extrusions and some were fabricated in the sense that they had been cut to size, milled and punched with holes. [Tr. pp. 175, 211.]

Mr. Gunderson's testimony confirmed that of Mr. Oldenkamp, *i.e.*, that appellant sold to Windsor a completed knocked-down door ready for sale to Windsor's customers [Tr. pp. 358-359] but that appellee only sold to Windsor the aluminum extrusions necessary to manufacture such a door. [Tr. p. 360.]

Admittedly the extrusions sold to Windsor by appellee were important to the production of the Windsor sliding door, for without them the door could not be produced. Equally important, however, were the dozens of other component parts purchased by Windsor from persons other than appellee. These included dust stops for head, dust stops for sill, metal-back weather seal for the top rails, vinyl-back weather seal for bottom rails and jambs, wheels, axles, corner screws, installation screws, safety bumpers, screws and nuts for safety bumpers, safety bumper spacers, back-up plates, jamb bumpers, jamb bumper screws, adhesive for dust stops, glazing vinyl, latches, keepers, screws for latches and keepers, weather-stripping and the necessary packaging material. [Tr. pp. 181-182.]

These parts were just as essential to Windsor's production of a sliding door as the parts furnished by appellee. [Tr. p. 213.] Unlike the knocked-down doors which were sold to Windsor by appellant in a form ready for sale, Mr. Oldenkamp testified that "considerable work" had to be performed on the extrusions sold to Windsor by appellee before they were ready for sale. In detail he testified that the extrusions had to be separated and identified with rubber stampings, the weather seal installed, the end rails tapped, the wheel carriers installed, the wheels and axles installed in the wheel carriers, the safety and strike bumper assembled, the latch and keeper attached, the dust stops installed, and in some cases the end and bottom rails had to be cut and drilled. Thereafter the parts had to be assembled and packaged. [Tr. pp. 173, 212.]

It is interesting to note that Louis Pinson, appellant's assistant secretary and assistant general manager, in connection with testimony relating to appellant's alleged damage, admitted not only that appellant completely fabricated, assembled and packaged the Panador before selling it [Tr. pp. 265-269], but also that the cost of the auxiliary parts of the door amounted to almost one-half of the cost of the extrusions. [Tr. pp. 265-266.]

Another of appellant's contentions at the trial of this action was that appellee unfairly took Windsor as a customer away from appellant. [Tr. pp. 232-237.] Over objections, Mr. Reznick was allowed to testify to a conversation he had with Mr. McLin in late 1954 for the limited purposes of showing the relationship between appellant and Windsor. [Tr. p. 237.] In this conversation, however, Mr. Reznick stated that Windsor owed appellant \$40,000.00 and admitted that he, on behalf of appellant, had refused to sell Windsor any further sliding doors until said sum was paid. [Tr. pp. 232, 237-238.] This was done *prior* to the time that appellee either ap-



proved Windsor's credit [Tr. p. 304], or shipped extrusions to Windsor! [Tr. p. 306.] The testimony of Mr. Gunderson confirmed that Windsor ceased to purchase from appellant not because appellee had solicited Windsor away from appellant but rather because appellant had refused to continue to sell to Windsor. [Tr. pp. 362-363.]

In further support of its claim of unfair competition, appellant sought to establish that during the period Windsor was being supplied with extrusions by appellee, appellant was being shorted by appellee. In this connection, both Mr. Reznick and Mr. Pinson testified that appellant was receiving incomplete and unbalanced shipments. [Tr. pp. 243-245, 259.] On further questioning, however, Mr. Reznick admitted that appellant had *always* had such difficulty in shipments from appellee. [Tr. pp. 244-245.] To substantiate Mr. Pinson's testimony in this regard, appellant introduced in evidence two letters addressed by appellant to appellee in which appellant complained about the unbalanced shipments. [Exs. 22, 23; Tr. pp. 260, 275-276.] As shown by appellant's reply letter [Ex. F; Tr. pp. 298-299] this evidence was insubstantial and appellant has not included them in the record on appeal. Appellee made incomplete shipments to appellant at appellant's own request, and appellee would not have made such shipments except for the fact that it was authorized to do so by appellant. [Tr. pp. 298-299.]

James M. Hairston, the plant controller of appellant's extrusion mill, testified with respect to appellee's production methods and the reasons why incomplete and unbalanced shipments of extrusions occurred. [Tr. pp. 355-356.] Appellee operates its extrusion mill on a job lot cost and production system. When an order is received, a master lot ticket is made identifying the product to be manufactured with the customer's order number. A separate ticket is prepared for each item ordered, and there may, therefore, be several tickets prepared with respect to one order. There also may be several tickets

prepared as to each item ordered because of the total quantity to be produced. The master lot ticket sets forth each step necessary in production and contains all of the instructions with regard to the processes required in each production phase. In short, the master lot ticket represents a schedule of the operations to be performed. Raw aluminum is processed through the mill, inspected, packaged and shipped in accordance with the instructions contained on the master lot ticket. [Tr. pp. 31, 352.]

While it is admitted that appellee's extrusion mill furnished both appellant and Windsor with similar shapes during the first half of 1955 [Tr. pp. 356-357], it is not true that appellee ever diverted extrusions originally produced or in the process of being produced for appellant to either Windsor or any other competitor of appellant. [Tr. pp. 33, 351, 356-357.] Shipments against orders were always made in accordance with the indications on the master lot ticket. Once the raw material is assigned to a lot ticket, it must follow through appellee's normal production operations as set forth in on the lot ticket until it is completed and ready for shipment to the customer. It is virtually impossible to cross-supply once the product has started into production because there are approximately 8000 jobs going through appellee's mill at any given time. The material is processed in batches, and in order to maintain control, it is necessary to keep the batches together. [Tr. p. 352.]

Similarly, the fact that appellee may have accepted an order from Windsor and given it a prior lot number would not meant that there was ever any delay to or interference with subsequent orders received from appellant. [Tr. pp. 33, 352-353.] In the first place, there are at least five

different operations necessary for the manufacture of the extrusions here involved. A prior order would not delay a subsequent order because when the subsequent order was received the prior order would have already passed through one or more of the production steps. The timing of the delivery schedule would not be affected. [Tr. p. 353.] In the second place, appellee had available more than one machine capable of manufacturing any given product [Tr. pp. 353-354], and in particular more than one set of dies used in producing the extrusion components of the sliding door here in question. [Tr. pp. 354-355.]

On the issue of damages, Mr. Reznick testified that in his opinion the sale of extrusions by appellee to Windsor “handicapped” the sales of appellant because he “thought” Windsor would have given appellant an order for 3,000 doors which Windsor had obtained from W. P. Fuller Co. [Tr. pp. 240-242.] On cross-examination, however, both Mr. Reznick and Mr. Grossman admitted that W. P. Fuller Co. had never been a customer of appellant *prior* to appellee’s dealings with Windsor. [Tr. pp. 245, 157-158, 359.] Mr. Reznick further admitted that *subsequent* to appellee’s dealings with Windsor and at the time of trial, appellant *was* selling direct to W. P. Fuller Co. [Tr. p. 245.]

Appellant called Mr. Pinson to testify with regard to the details of appellant’s alleged damage. The speculative nature of the evidence offered on this issue is best shown by a review of the evidence itself. Appellant first introduced a compilation of the production costs incurred by appellant in manufacturing the Panador, which had been prepared under the supervision of Mr. Pinson. [Ex. 24; Tr. pp. 264-265, 333-334.] From this compilation Mr.

Pinson testified that the total cost of producing one Panador was \$28.675 [Tr. p. 270]—composed as follows:

Cost of raw extrusions purchased from appellee [Tr. p. 265]	17.80
Cost of auxiliary components purchased for others [Tr. pp. 265-266]	8.145
Cost of labor [Tr. pp. 266-269]	2.36
Cost of packaging [Tr. p. 269]	.37

While this compilation was originally introduced to show appellee's production costs, it was later acknowledged that it was merely an "estimate" of production costs. [Tr. p. 339.] It was also shown that the compilation did not cover all sizes of the door in question [Tr. pp. 270-271] and was not based upon all of the doors produced by appellee but rather was based only on a run of 50 doors manufactured in the fall of 1954. [Tr. pp. 270, 340.]

In rebuttal of the figures offered by appellant, appellee called its plant controller, James M. Hairston, to the stand. Mr. Hairston pointed out not only that the cost data submitted was based on the "direct cost margin approach" which included only material and direct labor costs but also that this approach was not the one customarily used to obtain the cost of a product for profit and loss purposes. [Tr. pp. 341-342.] There was specifically omitted from appellant's cost figures any item for sales expenses [Tr. p. 346], for administrative expenses [Tr. p. 346] and for overhead, such as light, power, indirect labor, miscellaneous supplies, taxes, insurance, employee benefits and the like. [Tr. pp. 341, 346.] Mr. Hairston further testified that the normal method of allocating overhead was by prorating it against sales volume.



After the testimony of Mr. Hairston was received, appellant reopened its case in chief and recalled Mr. Pinson as a witness. The only written data of appellant which was available were summaries of the cost of all products produced by appellant including the Panaview door, the Panaview window and the Panador. [Exs. 26, 27; Tr. pp. 370-373, 390.] Neither of these documents was made as part of a certified audit [Tr. p. 391] and neither has been included in the record on appeal. While Mr. Pinson admitted that no records were available which related only to the Panador (the only product involved in this case), he was allowed to testify that in his "opinion" the cost of tooling for the Panador constituted only 20 per cent of the total cost of tooling and that the sales expense for the Panador constituted only 15 per cent of the total sales expense. [Tr. pp. 365-368.] Mr. Pinson further testified that during the period in question appellant had the plant capacity to produce 5,000 additional Panadors (which was the amount of extrusion parts Windsor had purchased from appellee) [Tr. pp. 273, 377], but that if appellant had manufactured the 5,000 additional Panadors, the overhead of appellant would have been increased by only 2 per cent. [Tr. pp. 377-378.] Mr. Pinson so testified even though, as will subsequently be shown, appellant only produced approximately 6,000 Panadors during the whole of the period in issue.

Appellant's evidence showed that its total sales of the Panador for 1954 amounted to \$135,995.24 and that its total sales of the Panador for the period from January through June, 1955, amounted to \$266,849.42. [Ex. 25; Tr. pp. 271, 335.] It was stipulated that in 1954 ap-

pellant produced approximately 2,000 Panadors and that from January through June, 1955, appellant produced 4,145 Panadors. [Tr. pp. 335, 336.] It was also stipulated that the average sales price of the Panador in 1954 was \$62.00 and in 1955 was \$65.00. [Tr. p. 336.]

In summary, the evidence contained in the record of this case shows conclusively that at no time has appellee ever been in the business of manufacturing sliding glass doors and at no time has it ever competed with appellant or any other company in the manufacture and sale of sliding doors. [Tr. pp. 20, 230.] Appellee did not, as is falsely alleged in appellant's third cause of action, unfairly compete with appellant by revealing the design of the Panador to its competitors. [Tr. pp. 20, 26-27, 36-37, 633.] Appellant placed the Panador on the open market for sale to the public long prior to appellee's dealings with Windsor. The Panador was not patented and could be copied by anyone. [Tr. pp. 141-142, 150, 155.]

Nor did appellee, as is also falsely alleged in appellant's third cause of action, unfairly compete with appellant by financing appellant's competitors. In this connection, appellee accepted orders from appellant and approved appellant's credit during the period from April, 1954, through February, 1955. [Tr. pp. 13-14, 39-40.] In April, 1955, appellee declined to extend further credit to appellant because appellant's payment record had been slow and because appellant's balance sheet dated February 28, 1955, showed a deficit working capital position of \$61,-631.00. During this period, however, appellee did not hold up shipments on the prior orders submitted by appellant and, in fact, continued to make shipments to appellant on those orders through May, 1955. In addition, appellee offered to extend further credit to appellant whenever their account was paid in full and their financial condition justified it. [Tr. pp. 14-15, 40.] As heretofore pointed out, appellee's approval of Windsor's credit was based solely upon Windsor's financial condition and that of its guarantor. [Tr. pp. 15-16, 304.]

## Specific Objections to Appellant's Statement of the Case.

In addition to the inclusion of documents in the record on appeal which were not received in evidence, appellant has incorrectly stated and has distorted many pertinent facts in an attempt to obtain the reversal of the judgment entered below. The most significant of these will be noted here, in the order which they appear in appellant's opening brief.\*

### 1. Appellant States That Its Drawings Were Submitted to Appellee "in Strict Confidence." (A. O. B. p. 2.)

The evidence does not support this statement. Appellee's evidence show that at no time in any stage in the placing of appellant's order was there any indication, suggestion or discussion of any kind that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 32, 36.] Appellant's product was neither novel nor patented. [Tr. pp. 20-21, 36-38, 141-142, 150.] By Mr. Grossman's own testimony the *only* conversation that he had with any representative of appellee which in any way related to this matter was the one he had with appellee's salesman, Mr. Kavich. [Tr. p. 158.] On cross-examination, Mr. Grossman admitted that all he told Mr. Kavich was that "Panador" was a new product and that he requested Mr. Kavich not to disclose to competitors the fact that appellee was in the process of producing and would soon market the "Panador." [Tr. p. 156.] Mr. Grossman's request was not that appellee not disclose design information but rather that appellee not disclose the fact that appellant was, in the future, going to put the Panador on the open market. This was done because of the highly competitive nature of the sliding door busi-

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\*Hereinafter referred to as A. O. B.

ness. Once the Panador was sold to the public, anyone was free to copy its design since it was not patented. On these facts the trial court correctly found that appellant's allegation that it had submitted the design of the Panador to appellee in trust and confidence [Complaint, Para. VIII; Tr. p. 6] was not true. [FF. Para. V; pp. 59-60.]

**2. Appellant States That Windsor's Orders Described the Products to Be Supplied by Appellee as so Many Sets K D Sliding Doors. (A. O. B. p. 4.)**

In an attempt to prove that appellee was in competition with appellant, appellant contended that appellee furnished to Windsor substantially the same product that appellant had furnished to Windsor, *i.e.*, knocked down doors ready for resale to customers. As part of its proof in this regard, appellant states that Windsor's orders described the product to be supplied by appellee as so many sets of K D Sliding Doors. (A. O. B. p. 4.) Such is not the fact. The orders themselves show that Windsor only ordered sets of K D Sliding Door *fabricated parts*. [Exs. 11, 12; Tr. pp. 188-192.] These parts were aluminum extrusions which constituted only a portion of the parts necessary to manufacture a sliding door. [Tr. pp. 175, 211-212, 219.] Mr. Oldenkamp testified in detail as to what other parts were necessary and to the fact that these other parts were not purchased from appellee. [Tr. pp. 181-182.] He also testified in detail with respect to the "considerable work" that was done by Windsor before the Windsor door was ready for sale to the public. [Tr. pp. 173, 212.] Mr. Pinson, appellant's assistant general manager, testified that the cost of the auxiliary parts amounted to almost one-half of the cost of the extrusions. [Tr. pp. 265-266.] Moreover, both Mr. Gunderson and Mr. Oldenkamp testified that the product furnished to Windsor by appellant was a finished knocked-down door, for which no additional parts were necessary, on which



no additional work was necessary, and which were completely ready for sale to the public. [Tr. pp. 217-218, 358-359.] This evidence showed conclusively that appellee, in fact, did not compete with appellant.

**3. Appellant States That Appellee Sold Parts to Windsor to the Exclusion of Appellant. (A. O. B. p. 5.)**

There is no evidence to support this contention. It is admitted that during the first part of 1955, appellee furnished both appellant and Windsor with similar extrusions. It is not true, however, that appellee ever diverted extrusions originally produced or in the process of being produced for appellant either to Windsor or to any other competitor of appellant, and the only evidence in the record so shows. [Tr. pp. 33, 351, 356-357.] It was also proved that the fact that appellee may have accepted an order from Windsor and given it a prior order number would not mean that there was ever any delay to or interference with subsequent orders received from appellant. [Tr. pp. 33, 352-355.] Except for its confusion value, one might well question the purpose of appellant's contention in this connection since it is conceded that the within cause does not seek damages for breach of appellee's agreement to furnish appellant extrusions. [Tr. p. 421.]

**4. Appellant States That It Was Receiving Incomplete and Unbalanced Orders Without Its Consent. (A. O. B. pp. 5, 6.)**

At the outset one may again question the purpose of appellant's contention, if indeed, not its good faith in making it. Specifically, appellant states that “. . . the internal records of appellee showed that the orders were for component parts of sliding doors which bore the notation: sliding doors, these are component parts so be sure and ship all sections at same time” (A. O. B. p. 5) and that “. . . during the period when appellant was being shipped incomplete and unbalanced orders, letters

were written to appellee protesting such shipments.” (A. O. B. p. 5.) While these letters were introduced into evidence [Exs. 22, 23; Tr. pp. 260, 275-276], appellant has not included them in the record on appeal. The reason is obvious: appellant’s reply letter [Ex. F; Tr. pp. 298-299] demonstrated that the unbalanced shipments to appellant were made at appellant’s request and that appellee would not have made such shipments except for the fact that it was authorized to do so by appellant, yet nowhere in its brief does appellant mention appellee’s reply letter.

Moreover, Mr. Hairston, appellee’s plant controller, testified with respect to appellee’s production methods and the reasons why incomplete and unbalanced shipments of extrusions occurred. [Tr. pp. 31, 352, 355-356.] As Mr. Hairston pointed out, one of the plagues of the extrusion industry is meeting its delivery schedule. During the period involved, appellee was up to only 60 per cent on its delivery schedule. This is perhaps unfortunate, but it is normal. [Tr. pp. 355-356.] Mr. Reznick, moreover, admitted appellant had *always* had such difficulty in shipments from appellee, even before appellee had accepted orders from Windsor. [Tr. pp. 244-245.]

**5. Appellant Implies That Windsor Stopped Purchasing From Appellant Because of Some Affirmative Act of Appellee. (A. O. B. p. 6.)**

Appellant states that “it was established, and not controverted by appellee, that late in 1954, when appellant was attempting to obtain back payments from Windsor, Mr. McLin, an officer of Windsor, stated that he *had* another source of sliding doors.” (A. O. B. p. 6.) The evidence relied upon by appellant is a conversation between Mr. Reznick and Mr. McLin at which no representative of appellee was present. This conversation was hearsay as to appellee, but appellant does not point out that it was admitted, over objection, only for the limited

purpose of showing the relationship of the parties—not to prove the truth of the matter asserted. [Tr. p. 237.]

Mr. Reznick testified to this conversation, and even if it be accepted as proof of the matters asserted, it shows only that Mr. Reznick, on behalf of appellant, had refused to continue to sell sliding doors to Windsor until Windsor paid \$40,000.00 which it owed to appellant. When, however, it is realized that this occurred *prior* to the time that appellee either approved Windsor's credit [Tr. p. 304] or shipped extrusions to Windsor [Tr. p. 306], it is clear that Windsor ceased to purchase from appellant, not because appellee had solicited Windsor away from appellant but rather because appellant had refused to continue to sell to Windsor. The testimony of Mr. Gunderson confirmed this fact. [Tr. pp. 262-263.]

**6. Appellant Not Only States That Appellee Shifted Its Ground of Defense Several Times but Also Attacks Appellee's Good Faith. (A. O. B. pp. 7-8.)**

One of appellant's most insidious insinuations occurs at pages 7 and 8 of its opening brief, where it is stated that appellant shifted its position and defense several times with respect to this case. It is true that appellee's answer denied the use of the dies here in question to produce extrusions for Windsor and that appellee later admitted that it had so used the dies. Appellant, however, has not deemed it proper or necessary to bring the attention of the Court to the explanation of appellee's counsel for such action—an explanation which was made to the trial court before appellee's opening statement and before any evidence was introduced and which was expressly made "so that there would be no misunderstanding" in this regard. [Tr. pp. 82-83.] It is not true, moreover, that appellee ever changed its defense. Appellee has always contended, and still contends, that no contract exists which prevented appellee from using the dies to produce extrusions for Windsor. [Tr. pp. 83-84, 280.]

### Summary of the Case.

When the foregoing detailed statement of facts is analyzed, a relatively uncomplicated and simple picture emerges.

Appellant is in the business of manufacturing and selling, among other things, sliding doors and windows. This business is very competitive. Appellee is in the business of producing and selling all types of aluminum products. Appellee's selling function is divided into two separate divisions. The Parts Division sells essentially industrial products and the General Sales Division sells essentially consumer or mill products. The separation of selling functions, however, is not arbitrary, and both divisions are qualified to handle the sale of ordinary type aluminum extrusions such as are involved in this case. On the other hand, appellee's production function is not divided. Its engineering department and extrusion mill handle all orders obtained, whether by the General Sales Division or by the Parts Division.

Early in 1954 appellant determined to produce a sliding glass door which it named "Panador." This door was manufactured by appellant from parts which it obtained from various sources. Negotiations for the aluminum extrusion components of the door were entered into by Mr. Grossman on behalf of appellant and by Mr. Yates on behalf of appellee's General Sales Division. In April appellant submitted drawings for the desired extrusions to appellee. The design of the extrusions was not secret or confidential. The sliding door involved was not unique or novel. It was similar in both shape, design and appearance to several doors already on the market. It was



not patented, and there is no element of "palming off" or confusion in the public mind presented.

Appellee's engineering department thereafter assisted appellant work out the details of design and made drawings for the necessary dies. Appellee then manufactured the necessary dies and produced and sold extrusions to appellant. In addition to the cost of extrusions, appellant paid a die charge for the use of the die. Appellant then combined the extrusions with the other parts it purchased elsewhere and produced a finished sliding door. This it packaged and sold to the public, including Windsor.

Up to this point, the picture was peaceful and serene. Ominous clouds, however, appeared in the latter part of 1954. At this time Windsor became delinquent in its accounts, and appellant refused to continue to sell to Windsor until the account was paid. Windsor would not be forced out of the sliding door business, and so it decided to manufacture its own door.

Negotiations were entered into by Mr. McLin and Mr. Gunderson on behalf of Windsor and by Mr. Sargeant on behalf of appellee's Parts Division. The negotiations were not only for extrusions for a sliding door but also concerned aluminum parts for a shower door, tub enclosure, sliding window and related items. Samples of the parts for all products desired were subsequently submitted to appellee's Parts Division and quotations were in turn submitted to Windsor. When Windsor thereafter placed an order for the aluminum extrusions, the samples were sent to appellee's engineering department to make die drawings. It was then determined that appellee already had on hand dies which would produce the

desired extrusions. These dies were not marked as secret or patented. Appellee's extrusion mill then used the dies, of which it had more than one set, to produce extrusions for Windsor. Windsor took the extrusions and then manufactured its own sliding door, using other components purchased elsewhere.

There is no suggestion in the record of any conspiracy between appellee and Windsor and against appellant. The appellee-appellant transaction was handled by Mr. Grossman for appellant and by Mr. Yates for appellee's General Sales Division. The appellee-Windsor transaction was handled by Messrs. McLin and Gunderson for Windsor and by Mr. Sargeant for appellee's Parts Division. Each transaction was separate and distinct from the other and each was handled by a different division of appellee. It was not until dies were to be produced for Windsor that appellee's engineering department determined that it already had on hand dies which would produce the item ordered by Windsor. At no time did appellee disclose any design information to Windsor.

No question could have been raised if Windsor had originally submitted samples to, say, Alcoa and Alcoa had then reproduced the necessary dies and sold extrusions to Windsor, since the Panador was not patented. Similarly, no question could have been raised if appellee had manufactured another set of dies and used them to produce extrusions for Windsor. [Tr. pp. 415-417.] Appellee didn't do this, and the only question presented is whether appellee had the right to use the dies on Windsor's orders.

It is not contended that appellee violated any custom or usage of the extrusion industry when it used the dies on Windsor's order. The evidence shows that appellee at no time diverted extrusions which it had produced or was in the process of producing from appellant to fulfill the orders of Windsor. The evidence also shows that

the use of the dies on Windsor's orders in no way interfered with or delayed the orders of appellant. The only question then presented is whether appellee violated any contract in so using the dies. The only writing relevant to this question is paragraph 11 contained in Exhibit 2. [Tr. pp. 91-92.] When further narrowed, the critical issue becomes the applicability and interpretation of paragraph 11. The trial court, after considering all the evidence, agreed with appellee and found that this paragraph had no application to the facts presented by the case at bar. This decision has ample support in the record.

### Summary of Argument.

The argument of appellee is three-fold. The first point made is that appellant has attempted to confuse the issue before this Court by using such terms as "confidential relation" and "breach of good faith," when in truth the only question to be determined is the applicability of Paragraph 11. Appellee's second point deals in turn with each of the allegations in appellant's Complaint, the trial court's findings with respect to each allegation, and the evidence supporting each of the findings. The final portion of appellee's argument meets and answers separately each of the seven arguments made by appellant for reversal of the District Court's judgment. Appellee's points are entitled as follows:

1. The only substantial question involved is whether a contract exists pursuant to which appellee agreed to construct dies solely and exclusively for appellant's use.
2. The findings of fact with respect to the issues involved are sufficient and are supported by the evidence.
3. Appellant's arguments for reversal of the judgment of the trial court have no factual or legal basis.

## ARGUMENT.

### I.

The Only Substantial Question Involved Is Whether a Contract Exists Pursuant to Which Appellee Agreed to Construct Dies Solely and Exclusively for Appellant's Use.

Throughout the pleadings, trial and argument of this case, appellant has talked in terms of "breach of confidential relation," "breach of good faith," "breach of trust and confidence," "fiduciary relationship," "unfair competition" and the like. The use of these terms serves no useful purpose. They only confuse and cloud the real issue involved.

In this case one must cut through the wall of words erected by appellant and look for the act of appellee which is alleged to be wrongful. When this is done, one finds all of appellant's alleged causes of action depend upon whether a contract existed pursuant to which appellee agreed to construct dies solely and exclusively for appellant's use or, to put it another way, whether appellee was prevented under the terms of a contract from making use of the dies for any purpose other than the production of extrusions for appellant's order. If such contract existed, appellee must live with it for appellee did at one time use the dies to produce extrusions for Windsor without the consent of appellant. If, however, no such contract existed, appellant could not have breached it, there would be no "breach of a confidential relation," there would be no "unfair competition," and each of appellant's alleged causes of action would fail. It is interesting to note that under astute questioning by the trial court, appellant acknowledged that its right to relief depended on whether appellee wrongfully used the dies involved and that this in turn depended on whether a contract for their exclusive use existed. [Tr. pp. 72-74, 81.]

II.

**The Findings of Fact With Respect to the Issues Involved Are Sufficient and Are Supported by the Evidence.**

Appellant's attack upon the judgment of the trial court is basically upon the findings of fact and the supporting evidence. Much of its brief is devoted to argument of the evidence and the inferences to be drawn therefrom. More difficult to deal with is the fact that appellant has stated that to be true which is not supported by the evidence or which has been specifically found to be untrue by the trial court. Appellant's attack in this connection must fail. The findings of fact made by the trial court are both sufficient and supported by the evidence.

**A. A Judgment Will Not Be Reversed on the Ground That the Evidence Is Insufficient to Support the Findings Where There Is Substantial Evidence in the Record.**

The rules of law with respect to the review of the evidence by the appellate court are well established and need but brief reference. Where there is substantial evidence supporting the determination of the trier of fact, the appellate court will not reverse the judgment on the ground that the evidence does not support the findings of fact.

*Nichols v. J. J. Newberry Co.*, 150 F. 2d 15 (9th Cir., 1945);

*Super Mold Corp. of California v. Bacon*, 130 F. 2d 860 (9th Cir., 1942).

On appeal, the evidence will be viewed in the light most favorable to the party who prevailed below and every reasonable inference will be made in favor of the findings of the trial court.

*Pasadena Research Laboratories v. United States*, 169 F. 2d 375, 380 (9th Cir., 1948);



*United States v. Aspinwall*, 96 F. 2d 867 (9th Cir., 1938);

*Inland Power & Light Co. v. Grieger*, 91 F. 2d 811 (9th Cir., 1937).

As was stated in *Ross v. British Yukon Navigation Co.*, 188 F. 2d 779 (9th Cir., 1951) at page 782:

“We must assume that all conflicts in the evidence were resolved against appellants and in considering the question of sufficiency of the evidence to sustain the verdict we look to the view thereof which is most favorable to appellee and we are obliged to accept as established all facts which have reasonable support in the evidence. Appellee is entitled to all inferences which may be reasonably drawn from the circumstances in evidence.”

Equally established is the rule that the appellate court will not weigh the evidence. Questions of credibility are for the trial court.

*Adolfson v. United States*, 159 F. 2d 883 (9th Cir., 1947);

*Suetter v. United States*, 140 F. 2d 103 (9th Cir., 1944).

In the case at bar, the trial court specifically found that the only writing involved did not apply to the facts of this case and that appellee had at no time agreed to keep the dies for appellant's sole and exclusive use. [FF. Par. II; Tr. p. 58.] As will be shown subsequently, this finding is abundantly supported by the record.

**B. There Is Substantial Evidence to Support Each of the Findings Made by the Trial Court.**

There is substantial evidence in the record on appeal supporting each of the findings of fact made by the trial court. For convenience and orderly analysis, appellee will refer separately to each of appellant's alleged causes of action, the evidence bearing thereon and the findings made by the trial court.

**1. BREACH OF CONTRACT—APPELLANT'S FIRST ALLEGED CAUSE OF ACTION.**

Appellant's first alleged cause of action is for breach of contract [Tr. pp. 3-6], and the material allegations are:

- a. Appellee agreed to make and keep dies for appellant's sole and exclusive use.
- b. Appellee breached this contract by using the dies to make extrusions for Windsor without appellant's consent.
- c. By reason thereof, appellant's competitors were able (1) to divert business from appellant, (2) to confuse the buying public as to the source of the doors, and (3) to use extrusions diverted from appellant.

It should be noted that in appellant's second alleged cause of action, it is alleged that there was a universal custom in the aluminum extrusion industry that dies paid for by one customer must be used only for that customer's order. [Complaint, Par. IX; Tr. pp. 6-7.] Appellant abandoned this contention at trial and offered no evidence in its support. [Tr. pp. 294-295.] Appellant's only claim to relief, therefore, depends upon whether a contract existed reserving the sole and exclusive use of the dies to appellant.

The trial court found that none of the allegations of appellant's first alleged cause of action were true except that appellee at one time used the dies to produce extrusions for Windsor without appellant's consent. [FF. Pars. II, III, IV; Tr. pp. 58-59.]

Taking the evidence with respect to appellant's alleged damage, it is clear that findings are supported by the evidence. In the first place, it is not true that by reason of appellee's acts, appellant's competitors were able to confuse the buying public as to the source of the doors. No evidence was introduced in support of this contention, and, in fact, appellant conceded no less than five times at the trial of this action that no element of "palming off," secondary meaning or confusion in the public mind entered into this case. [Tr. pp. 69, 73, 78, 422, 425.] In the second place, it is not true that by reason of appellee's acts, appellant's competitors were able to divert business from appellant. Except for Mr. Reznick's testimony that the sale of extrusions by appellee to Windsor "handicapped" the sales of appellant because he "thought" Windsor would have given appellant an order for 3,000 doors, no evidence was offered in support of this contention. On the other hand, both Mr. Reznick's testimony [Tr. pp. 232, 237-238] and Mr. Gunderson's testimony [Tr. pp. 362-363] demonstrated that the only reason Windsor stopped ordering from appellant was that appellant, for credit reasons, refused to continue to sell to Windsor. This was done prior to the time appellee either approved Windsor's credit [Tr. p. 304] or shipped extrusions to Windsor. [Tr. p. 306.] Finally, the evidence supports the finding that appellee did not divert extrusions originally produced or in the process of being produced for appellant to either Windsor or any other competitor of appellant. [Tr. pp. 33, 351, 356-357.]

It is equally clear that the evidence supports the finding that no contract between appellant and appellee existed

pursuant to which appellee agreed to make and keep the dies for appellant's sole and exclusive use. It is conceded by all that the only writing which in any way pertains to the use of the dies in this transaction is paragraph 11 contained in Exhibit 2. [Tr. pp. 91-92.] This document is an acknowledgment of the order appellant placed with appellee. Paragraph 11 provides as follows:

“11. EQUIPMENT: Any equipment (including jigs, printing plates or cylinders, dies and tools, etc.) which Seller constructs or acquires specifically and solely for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control. Any charges made by Seller therefor shall be for the use of such equipment only. When Seller has not accepted orders from Buyer for product to be made with such equipment for a period of one year, Seller may then require Buyer to give disposition of the said equipment, and in the event such disposition is not given within thirty (30) days after such demand, Seller may without liability make such disposition as it sees fit or may store the equipment for the account of Buyer, charging Buyer for the storage charges.”

Appellee contends, and contended at trial [Tr. pp. 83-84], that this does not constitute a contract to construct and keep dies solely and exclusively for appellant's order. In agreeing with appellee, the trial court considered the following facts and circumstances.

a. *Appellee's Acts Did Not Violate Any Custom or Usage of the Trade.*

In its complaint appellant alleged that there was a universal custom in the aluminum extrusion industry that the supplier of extrusions must use dies paid for by one customer only for that customer's order. [Complaint, Par. IX; Tr. pp. 6-7.] At the trial appellant completely

withdrew this contention and offered no evidence in its support. [Tr. pp. 294-295.] In so doing, appellant conceded that appellee violated no custom or usage of the trade by using the dies to produce extrusions for Windsor. Moreover, the only evidence in the record establishes that it was the custom in the industry (a) that the supplier of extrusions would manufacture the dies used in producing the extrusions ordered, (b) that title to the dies remained in the supplier, (c) that the buyer paid only a "die charge" for the use of the dies and (d) that the supplier was free to use the dies on anyone's order so long as there was no interference with the original buyer's orders. [Tr. pp. 25-27, 32.]

The evidence supports the trial court's implied, if not express, finding that appellee's use of the dies to produce extrusions for Windsor did not in any way interfere with or delay the orders of appellant. [Tr. pp. 33, 352-355.]

b. *The Language of Paragraph 11 Is Merely Conditional.*

Appellant contends that the first sentence of paragraph 11 constitutes a contract and firm commitment on the part of appellee to use the dies which it manufactured to produce appellant's extrusions solely on appellant's orders and for no other customer. A plain reading of this sentence, however, demonstrates that this is not the purpose or intent of the words used and is a strained and unreasonable construction of Paragraph 11.

Appellee submits that Paragraph 11 is not mandatory. It may or may not apply to any particular order. If the product to be produced from the die is a standard product which can be used freely by anyone, Paragraph 11 has no application. In such case there is no question with respect to who owns the die or to whether the extruder may use the die on anyone's order. The custom of the industry dictates that the extruder owns the die and that



the buyer merely pays a die charge for their use. On the other hand, if the product to be produced from the die is patented, for example, it is clear that the extruder cannot use the die except on the orders of the one who owns the patent. In such case Paragraph 11 applies and makes it clear that the die constructed by appellee nevertheless remains the property of appellee and that the Buyer still only pays for the use of the die.

The word "any," in its adjective sense, means "some," "at all," "in any degree," "to any extent" or "one out of several or many." (3 C. J. S. 1398, *et seq.*) When modified by the word "which," it is quite apparent that the paragraph above referred to is intended to mean that *if* Seller constructed any dies which were to be used specifically and solely on Buyer's order, then and in such event they would still remain Seller's property and be in Seller's possession and control. It does not mean that *every* die which Seller constructed for use on Buyer's order should be deemed to have been constructed solely for Buyer's use.

*Bates v. McHenry*, 123 Cal. App. 81, 86 (1932);

*Loyalton Electric Light Co. v. California Pine Box & Lumber Co.*, 22 Cal. App. 75 (1913).

The word "any," used in its adjective sense, followed by the word "which," obviously means that there may be *some* dies that are constructed only for one Buyer's use. It does not mean, however, that *all* dies constructed by Seller are necessarily for the sole use of Buyer. By Paragraph 11 appellee merely protected itself with regard to those situations where it is clear that the dies, by the very nature of things, must be used solely and exclusively on a given customer's order, in which case appellee reserved to itself the property right in and possession and control of the dies.

There are situations in the production of aluminum extrusions, as the testimony in this case shows, where the extruding company must necessarily use the dies which it manufactures to produce extrusions for a given customer solely on that customer's order, *i.e.*, where the dies are used to make classified or secret military products, patented products or highly specialized, technical or unique equipment. [Tr. p. 26.] This is not the case with the orders which were placed by appellant, such orders having been placed in the ordinary manner and in the usual routine of appellee's business. [Tr. pp. 16, 20, 33, 36-37.] The products were clearly not for military use, and it was stipulated that they were not patented. [Tr. pp. 141-142, 150.] At no time was there any indication, suggestion or discussion that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 32, 36.] The extrusions produced were similar in both shape and design to the components of other doors [Tr. pp. 36-38, 325-327] and to hundreds of other extrusions previously manufactured by appellee. [Tr. pp. 20-21, 36-38.] In addition the trial court had a model of the door before it from which it was clear that it was nothing more than a standard sliding door. [Ex. 7; Tr. p. 125.]

On these facts, the trial court very correctly found that it “. . . is not true . . . that the dies in controversy were constructed ‘solely for use on buyer's order’ within the meaning of Paragraph 11 . . . nor is it true that (appellee) at any time agreed to keep such dies for (appellant's) sole and exclusive use.” [Tr. p. 58.]

*c. Appellant's Own Evidence Substantiated the Trial Court's Interpretation of Paragraph 11.*

Prior to the time appellant ordered extrusions from appellee, appellee had done business with a corporation called Glide Windows, Inc. While Messrs. Grossman and

Reznick were officers in the Glide corporation, Glide is not a party to this action or in anyway connected with it. Nevertheless, Mr. Grossman was allowed to testify over objection that in 1948 (6 years before appellant dealt with appellee) a representative of appellee told him that dies used to produce sliding window extrusions would be for the exclusive use of Glide Windows, Inc. [Tr. pp. 99-101, 136-137.] This testimony proved to be of utterly no value to appellant, however, for two reasons.

In the first place, appellee's dealings with Glide cannot in anyway be held binding upon appellee in its dealings with appellant. Appellant and Glide are two separate corporations and must be treated as such. In the second place, the acknowledgment appellee sent Glide was worded entirely differently than the one used in the case at bar. [Ex. 5; Tr. pp. 108-110A.] The pertinent paragraph of that acknowledgment is paragraph 12 which reads as follows:

*“Equipment:* Any equipment (including jigs, printing plates or cylinders, dies and tools, but excluding patterns) which Seller constructs, or acquires specifically for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for the use of such equipment only. All such equipment will be used exclusively for the manufacture of products for Buyer. . . .”

The language used here is completely unlike that used in paragraph 11, for, as is obvious, the whole sentence is omitted in paragraph 11 which reads: “All such equipment will be used exclusively for the manufacture of products for buyer.” In the second sentence of paragraph 12, the words “such equipment” refer to that equipment, if any, which is constructed “*specifically* for use on Buyer's

order.” This sentence makes it clear that dies constructed specifically for use on buyer’s order cannot be used to make products to fulfill another’s order. If the words used in paragraph 12 had been used in the acknowledgment appellee sent to appellant, appellant would be correct in asserting that appellee breached its contract in using the dies to make extrusions for Windsor since it is conceded that the dies were made “specifically” for use on appellant’s order. [Tr. p. 430.]

Compare again the wording of paragraph 11. It states, in effect, that *if* any equipment is constructed “specifically and solely” for use on buyer’s order, it shall nevertheless remain the property of the Seller. This paragraph does not say that *all* equipment is, as a matter of fact, deemed to be constructed specifically and solely for use on buyer’s order. Appellee submits that the evidence fully supports the trial court’s finding that the dies appellee constructed were not made “solely” for use on appellant’s order. They were not of a secret or confidential nature. They were not patented, and they were not technical or unique in either design, shape or appearance. Appellee was therefore free to use them to produce extrusions for Windsor or anyone else, so long as appellant’s production use was not interfered with.

d. *Appellant Paid Only a Die Charge for the Use of the Dies.*

Appellant contends that if Paragraph 11 does not apply, then appellant must have purchased the dies and is, therefore, the owner of them and entitled to their exclusive use. Appellant contends that Paragraph 11 is the only writing involved and that if it does not apply, there is no basis for the trial court’s finding that appellee owns the dies. There are several answers to this contention. In the first place, the argument ignores the established

custom in the extrusion industry which provides that the supplier manufactures the dies and, *in the absence of contract to the contrary*, retains title to them, the buyer only acquiring the right to their prior use. [Tr. pp. 25-27, 32.] In the second place, the evidence does not support appellant's contention that it purchased the dies. In fact, it demonstrates that appellant merely paid a die charge for the *use* of the dies. The uncontradicted evidence in this respect shows that appellant paid only \$1,430.00 [Tr. pp. 40, 262-263] even though the dies cost over twice that much to produce, *i.e.*, \$3,176.00. [Tr. p. 343.] Moreover, the amount paid by appellant was specifically referred to as a "die charge" in the original order given appellee. [Ex. 21; Tr. pp. 254-255.] It was also shown that appellant paid no sales tax on the dies. [Ex. 21; Tr. pp. 254-255, 434.] Furthermore, appellee manufactured more than one set of dies for use on appellant's order. [Tr. pp. 354-355.] This was done as a part of appellee's internal production method and as a necessary step in fulfilling appellant's extrusion order. Finally, appellant only ordered from appellee aluminum extrusions, not dies. [Ex. 2; Tr. pp. 91-92, 39-40.]

On these facts, it was quite clear to the court below that neither party intended title to the dies to pass to appellant and that both parties understood and intended that the amount paid appellee with respect to the dies was only a service charge for their use. The court so found [Tr. p. 58] and the record supports this finding.

In summary, appellee submits that Paragraph 11 does not constitute a contract for the sole and exclusive use of the dies for appellant. It merely refers to any equipment *which* is constructed or acquired specifically and solely for use on buyer's order and provides for appellee's ownership of such equipment in such case. It does not purport to say that equipment *has been* constructed or



acquired specifically and solely for use on buyer's order. It provides for that possibility but does not go further. Language of a contract must be given effect according to its obvious meaning without implication of provisions not included.

The trial court's interpretation of Paragraph 11 is binding on this Court. It is now well established, in this connection, that where the trier of fact has interpreted a contract in the light of extrinsic evidence, the interpretation made is conclusive on appeal.

*Estate of Rule*, 25 Cal. 2d 1, 11 (1944);

*Transportation Guar. Co. v. Jellins*, 29 Cal. 2d 242, 254 (1946);

*Jordan v. Reynolds*, 97 Cal. App. 2d 194, 197 (1950).

## 2. BREACH OF CONFIDENTIAL RELATION—APPELLANT'S SECOND ALLEGED CAUSE OF ACTION.

The material allegations of appellant's second alleged cause of action are.

- a. Appellant conceived and designed a sliding door.
- b. Appellant submitted the design, in the form of drawings, to appellee in trust and confidence.
- c. Appellee violated the trust and confidence by using the information and drawings to produce extrusions for appellant's competitors.

There has been omitted from the above list the allegations concerning the existence of a universal custom in the aluminum extrusion industry that the supplier of extrusions must keep confidential all information disclosed to it by its customers [Complaint, Par. IX; Tr. pp. 6-7] because, as noted above, appellant withdrew its contention in this regard at the time of trial. [Tr. pp. 294-295.]

The trial court found that it was true that appellant conceived and designed a sliding door and that appellant submitted the same to appellee in the form of drawings. However, the trial court found that it was not true that the drawings were submitted in trust and confidence and that it was not true that appellee used the drawings and information to produce extrusions for appellant's competitors. [FF. Par. V; Tr. pp. 59-60.] Again, these findings have substantial support in the record.

With respect to the submission of the drawings in confidence, the evidence adduced by appellee showed that at no time in the placing of appellant's order was there any indication, suggestion or discussion of any kind that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 31, 32, 36, 37.] The only evidence submitted by appellant was the testimony of Mr. Grossman to a conversation he had with appellee's salesman, Mr. Kavich, at the time the drawings were submitted to appellee. [Tr. p. 158.] On cross-examination, Mr. Grossman admitted that all he told Mr. Kavich was that the Panador was a new product and that he didn't want Mr. Kavich personally to disclose to appellant's competitors the fact that appellant was coming out on the market with it—not that the design information was confidential. [Tr. p. 156.]

The Panador was not patented nor were any of the parts used in making it. [Tr. pp. 141-142, 150.] Once it was sold on the open market, it was in the public domain and could be copied by anyone who wished to do so. Moreover, there was not even anything unique in the sliding door or its component aluminum extrusions. [Tr. pp. 20-21, 37.] It was similar in both design, manufacture, shape and appearance to many other sliding doors already on the market. [Tr. pp. 36-38, 325-327.] This evidence

fully justified the trial court's finding that the drawings were not submitted to appellee in trust and confidence and were not of a confidential nature.

The evidence also supports the finding that appellee did not use the drawings or information to produce extrusions for appellant's competitors. There is absolutely no evidence in the record to the contrary. The undisputed evidence shows that Windsor initiated negotiations with appellee for the purchase of numerous aluminum products, among which were extrusions for a sliding door, a sliding window, and a shower door. [Tr. pp. 18-19, 170, 185-186 and Ex. 13, pp. 193-198.] As is normal in the extrusion industry, the design of the extrusions for the sliding door which Windsor desired were submitted to appellee by sample. Windsor had obtained the design from sources other than appellee and submitted the same to appellee. Appellee did not submit the design to Windsor. Thereafter, appellee submitted quotations on all of the products wanted by Windsor and there followed an order from Windsor for, among other things, extrusions for a sliding door. [Tr. pp. 19-20.] It was not until after this that appellee's engineering department discovered that appellee already owned dies which would produce the desired extrusions. [Tr. p. 32.] It should also be noted that Mr. Sargeant, appellee's Regional Sales Manager, Parts Division, conducted the negotiations with Windsor but had no connection or dealings with appellant. [Tr. p. 18.]

The uncontroverted evidence further shows that appellee did not reveal to Windsor, at any time, any information with respect to the shape or design of appellant's sliding door, appellee's quotations and extrusions having been based upon samples and specifications furnished to it by Windsor for a sliding door which had been for sale on the open market for some months prior to its submission to appellee. [Tr. pp. 20, 33, 36-37, 363.]

The only act done by appellee was that of using its existing dies to produce extrusions for Windsor. In so doing appellee followed its usual procedure and the normal and customary usages of the trade. [Tr. pp. 25-27, 32.] Appellee's action was not tantamount to a disclosure of appellant's drawings and information or "breach of a confidential relation," and indeed, was not wrongful unless there existed a contract for appellant's exclusive use of the dies.

### 3. UNFAIR COMPETITION—APPELLANT'S THIRD ALLEGED CAUSE OF ACTION.

Appellant's third alleged cause of action is for unfair competition [Tr. pp. 7-8] and the material allegations are that appellee unfairly competed with appellant by:

- a. Making and selling extrusions from the dies paid for by appellant.
- b. Revealing the design of appellant's door to appellant's competitors.
- c. Financing appellant's competitors by advancing them credit.

The trial court found that none of these allegations were true. [FF. Para. VI; Tr. p. 60.] Again, these findings have substantial support in the evidence. The first two allegations are but repetitions of the contentions made by appellant in its first and second alleged causes of actions, except that they now are classified as "unfair competition." As such they deserve no further consideration, having already been met and answered.

The finding that appellee did not unfairly compete with appellant by financing appellant's competitors has a firm foundation both in law and fact. It needs no citation of authority to establish that public policy fosters free competition. Merely financing another's competitor, obviously, does not constitute unfair competition else no sup-

plier, wholesaler or bank would be in business today. This demonstrates also that appellant's alleged grievance depends ultimately upon a contract for the exclusive and sole use of the dies—not a strained concept of unfair competition.

Be that as it may, the evidence before the trial court shows that there was nothing unfair in the manner appellee extended credit to Windsor. Appellee handed Windsor's account in its usual and normal manner, without regard either for or against appellant. Appellee accepted orders from appellant and approved appellant's credit during the period from April, 1954, through February, 1955. [Tr. pp. 13-14, 39-40.] In April, 1955, appellee declined to extend further credit to appellant because appellant's payment record had been slow and because appellant's balance sheet dated February 28, 1955, showed a deficit working capital position of \$61,631.00. During this period, however, appellee did not hold up shipments on prior orders submitted by appellant and, in fact, continued to make shipments to appellant on those orders through May 1955. In addition, appellee offered to extend further credit to appellant whenever its account was paid in full and its financial condition justified it. [Tr. pp. 14-15, 40.]

The credit of Windsor was approved by Mr. Miles, appellee's credit manager, in December, 1954, on the basis of Windsor's balance sheet dated November 30, 1954, showing a working capital of \$80,200.00 and a guarantee received from Associated Finance Company. The extension of this credit and the approval of Windsor's orders were done in the normal course of business and as a routine transaction. It was based solely upon the financial condition of Windsor and that of its guarantor. The uncontroverted testimony shows that so far as appellee was concerned, the two transactions were completely unrelated, and one had no bearing on the other. [Tr. pp. 15-16, 304.]



The more exacting question with respect to appellant's alleged cause of action for unfair competition is whether appellee in fact "competed" with appellant, it having been stipulated that no element of palming-off, secondary meaning or confusion in the public mind entered into this case. [Tr. pp. 69, 73, 78, 422, 425.] Even the most cursory review of the record demonstrates that the evidence supports the trial court's finding in this regard, *i.e.*, that appellee did not compete with appellant.

To begin with, it must be again pointed out that the necessity of reaching this issue arises only because appellant has classified appellee's alleged acts as "unfair competition" even though the only act in question is the use of the dies to make extrusions for Windsor. As in the case of financing another's competitor, merely supplying extrusions to another's competitor does not and could not constitute unfair competition. If it did, there would be no such thing as a wholesaler in our economy. Thus, we must again return to the fact that appellee used the same dies to supply extrusions to appellant as it did to supply extrusions to Windsor, and ask whether this was wrong. As heretofore stated, appellee believes that the answer depends upon the law of contracts—not upon the concept of "unfair competition." Since, however, appellant has raised the issue, appellee is compelled to call the court's attention to the evidence supporting the trial court's finding that appellee did not "compete" with appellant either fairly or unfairly.

In the court below appellant contended that Windsor ordered *doors* from appellee in substantially the same manner as it would have ordered doors from appellant. [Tr. p. 176.] The testimony of Mr. Oldenkamp and Mr. Gunderson, both disinterested witnesses, completely refuted this contention. Both witnesses testified that the product Windsor purchased from appellant were assembled doors, received as "completely marketable, ready

to ship items.” [Tr. pp. 217, 218, 358-359.] These doors were “knocked down,” which meant that all the component parts had been fabricated and packaged together for sale to the public. Windsor only had to put its label on the package and then sell it. [Tr. p. 359.]

On the other hand, the uncontroverted evidence shows that appellee supplied Windsor with only a portion of the components used by Windsor in producing a sliding door, *i.e.*, aluminum extrusions. [Tr. pp. 175, 211-212, 219, 360.] Mr. Oldenkamp testified in detail not only with respect to all of other component parts Windsor purchased from others [Tr. pp. 181-182] (which appellant’s evidence showed cost almost one-half the cost of the extrusions [Tr. pp. 265-266]) but also with respect to the “considerable work” which had to be done by Windsor in manufacturing a door before it could be sold. [Tr. pp. 173, 212.]

On this evidence it was abundantly clear to the trial court that appellee was not in competition with appellant. Indeed, what it showed was that Windsor, not appellee, was in competition with appellant. The reason Windsor decided to compete with appellant by manufacturing its own doors is also clear from the record: Appellant had refused to continue to sell doors to Windsor because of unpaid accounts Windsor owed appellant. [Tr. pp. 362-363.]

In summary, appellee submits that the findings of fact made by the trial court are not only sufficient but also supported by substantial evidence. Accordingly, the judgment entered below should be affirmed.

III.

**Appellant's Arguments for Reversal of the Judgment of the Trial Court Have No Factual or Legal Basis.**

In support of its appeal, appellant makes two arguments with respect to its breach of contract cause of action and five arguments with respect to its "breach of confidential relation" and "unfair competition" causes of action. (A. O. B. p. 9.) None of these arguments are meritorious, either in fact or law. To demonstrate their lack of merit, appellee will consider each in turn even though repetition of some of the points already made by appellee may be necessary.

**A.**

**Appellant's First Argument for Reversal Is That: The Printed Paragraph Providing for a Die Charge for Dies Constructed Specifically and Solely for Appellant Clearly Applied to the Die Charges Listed Elsewhere in the Contract. (A. O. B. p. 10.)**

The first argument of appellant deals with its cause of action for breach of contract and in particular with the interpretation and application to be given to Paragraph 11. In partial answer to this argument, appellee refers the Court to appellee's point designated in this brief as "II.B.1" and in particular to subsections "a", "b", "c" and "d" thereof.

Much of appellant's first argument is devoted to stating the rules of law applicable to the interpretation of contracts. With these rules appellee has no quarrel. With the result to be reached in their application, however,

appellee takes issue. In substance, appellant's argument is as follows:

- a. The amount paid by appellant for dies is described as a "die charge."
- b. Paragraph 11 is the only provision referring to charges for dies.
- c. Paragraph 11 only applies if dies are made "specifically and solely" for use on buyer's order.
- d. Therefore, dies must have been made "specifically and solely" for use on appellant's order.

Appellee can only agree with the three premises used in this argument. Each taken alone is true. When taken together, however, they assume that which is yet to be determined and thereby beg the question. The conclusion reached, consequently, is an error in logic.

The question in issue is the meaning of Paragraph 11. The first sentence reads: "Any . . . dies . . . *which* Seller constructs . . . specifically and solely for use on Buyer's order shall . . . remain Seller's property . . ." The question then becomes: Were the dies here involved constructed "specifically and solely" for use on appellant's order? The second sentence of Paragraph 11 does not help answer this question. It reads: "Any charges made by the Seller *therefore* shall be for the use of such (dies) only." The word "therefore" refers to "any dies *which* Seller constructs specifically and solely for use on Buyer's order." The question consequently remains: Were the dies here involved constructed "specifically and solely" for use on appellant's order?

Admittedly the dies were made specifically for appellant. Such was admitted at the trial. [Tr. p. 430.] However, it was not admitted that the dies were made “solely” for use on appellant’s order. After hearing all the evidence, the trial court found that the dies were not made solely for use on appellant’s order. [Tr. p. 58.] This finding is supported by the evidence, as has heretofore been pointed out in Part II.B.1. of this brief.

### B.

**Appellant’s Second Argument for Reversal Is That: If Ambiguous, the Contract, Drafted by Appellee, Should Be Construed in Favor of Appellant. (A. O. B. p. 15.)**

Appellant’s second argument also deals with its cause of action for breach of contracts and, again, with the applicability of Paragraph 11. This argument is the most difficult to answer—not because of its merit but rather because of appellant’s insistence upon the inference, the half-truth and that which is not in the record. Almost every sentence of appellant’s second argument requires careful attention else that which is not true may pass for that which is.

Before considering the detail of this argument, however, the question must be asked: What is appellant’s second argument? In doubting the ambiguity of Paragraph 11, appellant at one point states: “It is submitted that such parole evidence would be admissible only if the contract is ambiguous or uncertain.” (A. O. B. p. 15.) This statement is made to serve the interest of appellant as it appears at page 15 of appellant’s brief. The exact contrary position, however, is taken in the footnote of appellant’s brief at page 22 where appel-



lant's interest has apparently changed. Notwithstanding appellant's inconsistent position, appellee submits that the evidence admitted by the trial court concerning the surrounding circumstances was not only admissible in determining the meaning and application of paragraph 11,

*Wachs v. Wachs*, 11 Cal. 2d 322 (1938);

*Walsh v. Walsh*, 18 Cal. 2d 439 (1941);

*Gibson v. De La Salle Institute*, 66 Cal. App. 2d 609 (1944).

but also to identify the subject matter of Paragraph 11.

*Lewis Publishing Co. v. Henderson*, 103 Cal. App. 425 (1930).

Appellant also apparently contends that if Paragraph 11 is ambiguous it must, as a matter of law, be construed in favor of appellant. (A. O. B. pp. 15-16.) In support of this contention, appellant cites only Civil Code, Section 1654. The case law, as well as the very words of the statute itself, however, shows that Civil Code, Section 1654, is not mandatory—it is simply an aid to construction.

*Dexter v. Stevenson Properties, Inc.*, 39 Cal. 2d 407, 418 (1951);

*Hogue v. Ford*, 44 Cal. 2d 706, 711 (1955).

The real aim of appellant's second argument is found in the last sentence of the argument. (A. O. B. p. 25.) Appellant is arguing nothing more nor less than that the evidence does not support the trial court's findings that (1) appellant only paid a service fee for the use of the dies and (2) the dies were not made solely for appellant's use. The evidence relied upon by appellant will be considered in order.

1. JUDICIAL ADMISSIONS. (A. O. B. pp. 17-19.)

In arguing the evidence, appellant begins by referring to what are termed “judicial admissions.” Here appellant relies most heavily upon the inference and that which is not in the record. Appellant first refers to statements of Messrs. Duque and Lydick which are not in evidence and to a portion of the affidavit of Mr. Yates. Appellant contends that these so-called “judicial admissions” demonstrate that appellee relies on Paragraph 11 to give it the property rights in the dies. Such is not the case. Appellee’s argument at trial was two-fold. Appellee’s primary contention was, and still is, that Paragraph 11 does not apply to the case at bar, *i.e.*, that since appellant’s product is not of a patented, secret or unique nature, Paragraph 11 has no application. As an alternative argument, appellant contended that *if* Paragraph 11 applied it constituted nothing more than an agreement that the dies belonged to appellee and that appellant was to pay only a charge for their use. The trial court agreed with appellee’s primary contention which consequently rendered appellant’s alternative argument moot. Appellant has not deemed it necessary to state fully appellee’s contentions, apparently with the hope that appellee also would not.

Appellant then refers to a question by the trial court [Tr. p. 405] and states that “. . . counsel for appellee made no objection or contrary argument.” (A. O. B. p. 18.) Appellant does not point out, however, that the trial court was directing his remark “specifically and solely” to Mr. Mahoney and that the dialogue took place during ~~appellant’s~~ <sup>cc’s</sup> closing argument, a time when ~~appellee’s~~ <sup>cc’s</sup> counsel was neither expected nor had the right to interrupt.

The final references to “judicial admissions” by appellant are equally interesting. (A. O. B. pp. 18-19.) The full context of these statements shows only that “under Paragraph 11” appellee contended that it still held title to the dies. They are not admissions that Paragraph 11 necessarily applied to the dies involved in this case, or that Paragraph 11 constituted an agreement for the exclusive use of the dies. References to the parts of the record not cited by appellant indicate that appellee always contended that there was no contract between appellant and appellee and that Paragraph 11 had no application to the case at bar. [Tr. pp. 83-84, 89, 280, 430-431.]

## 2. FURTHER EVIDENCE. (A. O. B. pp. 19-21.)

Appellant continues its argument of the evidence by referring to what is called “further evidence.” Here appellant argues that since appellee inserted in the die drawings the word “Panaview” opposite a space entitled “customer,” it must follow that the dies were constructed both “specifically and solely” for appellant. This is insubstantial. This fact shows only that the dies were made “specifically” for appellant, a fact which was expressly admitted in the court below.

Appellant next seeks to rely on the fact that the original drawings submitted to appellee bore the marks “patents pending.” This too is insubstantial, for appellant twice conceded that the sliding door involved in fact was not patented and that the patent applications had been dropped. [Tr. pp. 141-142, 150.]

Appellant then argues that because appellant paid a “substantial” die charge for the use of the dies it must follow that appellant obtained their exclusive use. This

argument is an off-shoot of appellant's argument that if Paragraph 11 doesn't apply, then appellant must have purchased the dies and thereby had the right to their exclusive use. [Tr. p. 87.] In finding to the contrary [Tr. p. 58], the trial court had before it the following facts:

- a. The cost of the dies were more than twice what appellant actually paid. [Tr. p. 343.]
- b. The amount paid by appellee was termed a "die charge." [Ex. 21; Tr. pp. 254-255.]
- c. Appellant paid no sales tax on the dies. [Ex. 21; Tr. pp. 254-255, 434.]
- d. Appellee manufactured more than one set of dies for use on appellant's order. [Tr. pp. 354-355.]

This evidence is clearly sufficient to support the trial court's finding that appellant only paid a service charge for the use of the dies and that appellant neither acquired title to the dies or the right to their exclusive use.

Finally, appellant refers to a letter alleged to have been written by an attorney on behalf of appellee. (A. O. B. p. 21.) This letter is one of the subjects of appellee's motion to strike. It was neither offered nor received in evidence, although it was available to appellant's counsel during trial. [Tr. p. 54.] Appellant's reference to this document is most improper and needs no further consideration.

Before leaving this part of appellant's argument, appellee feels called upon to comment on the seemingly innocuous sentence used by appellant which reads:

"But compare, claim of 'custom,' R. 25-27, later abandoned, R. 292."

Appellant implies that appellee relied upon custom and usages of the industry and later abandoned them. Such is not the fact. Appellant was the one which relied upon customs of the industry [Complaint, Par. IX; Tr. pp. 6-7] and subsequently abandoned the contention. [Tr. p. 295.]

### 3. CONDUCT OF THE PARTIES, (A. O. B. pp. 21-22.)

In reviewing the evidence, appellant next refers to what is termed "conduct of parties." Under this heading, appellant refers to one portion of appellee's opening statement, isolates the words "made for Panaview," and argues that this shows appellant had "an interest in these dies under the contract." This type of reasoning is fanciful. The issue here is not whether appellant had an interest in the dies but rather what the nature of its interest was. Appellee conceded at trial that the dies were not only made for appellant's use but also that they were made specifically for appellant's use. This, however, does not answer the question whether they were made solely for appellant's use.

Appellant next refers to the fact that additional dies were made to produce extrusions for Windsor, and asks: "Why would appellee bother to duplicate dies if it owned them outright with all rights to use them for anybody in the world, solely in its own discretion?" There's a rule about asking rhetorical questions: Don't ask them when your opponent has the opportunity to answer. In the first place, the testimony of Mr. Hairston shows not only that the dies were duplicated for use on Windsor's orders but also that in the particular case of the dies "built for Panaview" appellee had originally manufac-



tured more than one set of dies. [Tr. pp. 354-355.] Appellee duplicated the dies when Windsor came into the picture so there could be no confusion, delay or interference with appellant's future orders, it being assumed that appellant would continue to order extrusions. Appellee originally manufactured more than one set of dies for use solely as part of its internal production method. The making of extrusions involves a large plant, heavy equipment and many workmen. Each job must be so scheduled that it will not interfere with the approximately 8,000 other products going through appellee's extrusion mill at any given time. [Tr. pp. 352, 357.] A break-down at one stage would delay the whole production process. Consequently, appellee manufactures duplicate dies, at a relatively small cost compared to that which would be involved if the whole production process were delayed, in order to insure itself of as great a production capacity and efficiency as possible.

#### 4. SURROUNDING CIRCUMSTANCES. (A. O. B. pp. 22-23.)

Appellant concludes its argument of the evidence under the title "surrounding circumstances." The contentions of appellant with respect to this argument are grossly misleading. Appellant states, in connection with transactions occurring prior to the one herein involved, that appellee had "written letters to *appellant* asking whether dies should be destroyed or stored" and that "*appellant* was directly advised that it had exclusive use of the dies on which it paid die charges." This is wholly untrue. Appellant has again deemed it unnecessary to point out that this previous transaction was with Glide Windows, Inc., a corporation—*not appellant*.

The evidence with regard to this transaction is summarized in the first few paragraphs under the heading "Statement of Facts" which appears in the early portion of this brief. It is clear that Paragraph 12 used in the Glide order is different from Paragraph 11 used in appellant's orders. Paragraph 12 refers by description to "any equipment . . . which Seller constructs *specifically* for use on Buyer's order" and then states affirmatively that "all *such equipment* will be used exclusively for the manufacture of products for Buyer." Here there is an express mandate that any die made specifically for one customer *will* be used exclusively for that customer. Paragraph 11, on the other hand, contains no such mandate.

Appellee insists that the difference between Paragraph 11 and Paragraph 12 is only one of form, not substance. The plain reading of the language used in each, however, demonstrates the contrary. The significance of the difference is emphasized, moreover, when it is realized that the products referred to in the Glide orders were patented. [Tr. pp. 250-251.] This fact alone makes it apparent that the Glide-appellee transaction is completely different from the one before this court and, therefore, that it has no bearing on this case.

The whole of appellant's second argument for reversal, although couched in terms of "judicial admissions" and the like, is nothing more than an argument of the evidence. It must fail, for as pointed out in Part II-B of this brief, the findings of fact made below have substantial support in the evidence.

C.

**Appellant's Third Argument for Reversal Is That: A Property Right Existed in Appellant Because of Its Creation of Original Designs for Sliding Doors Submitted in Confidence to Appellee. (A. O. B. p. 25.)**

Appellant's third argument for reversal refers to its cause of action for breach of a confidential relation. The argument is as follows:

- a. Appellant created a design.
- b. The design was submitted to appellee.
- c. Therefore, the information was privately owned and not intended for public distribution.
- d. Appellee's wrong was aggravated because appellee:
  - (1) Breached its trust with appellant,
  - (2) Stole its customer, and
  - (3) Entered into competition with appellant.

The basic fault of this argument lies in the fact that the premises adopted by appellant have no foundation in the record. To begin with, appellant's first premise assumes that the drawing it created related to a design or information which had the stature of a "trade secret." While appellee did not dispute that the drawing was appellant's creation, appellee vigorously disputed that the design or information constituted a trade secret. The evidence introduced by appellee in this connection showed that the extrusions were neither patented [Tr. pp. 141-142, 150] nor even unique. [Tr. pp. 20-21, 37.] They were similar in both shape, design and appearance to the components of many sliding doors already on the market. [Tr. pp. 36-38.] In this regard Mr. Meyer expressly testified that part for part each component of

the Panador was similar in shape and design to the components of other doors. [Tr. pp. 325-327.] Even Mr. Grossman admitted, on cross-examination, that each of the parts used in the Panador had been used in other sliding doors. [Tr. pp. 150-151.] Even more significant is the fact that a model of the Panador was introduced into evidence, from which it was clear to the trial court that it was nothing more than a standard sliding door with no new, novel or unique features. [Ex. 7; Tr. p. 125.] Moreover, at no time in any stage in the placing of appellant's order was there any indication, suggestion or discussion of any kind that the work being performed for appellant or the designs of such work were of a secret, confidential or unique nature. [Tr. pp. 26, 32, 36.] This evidence fully justified the trial court's conclusion that the design was not of a secret nature and that there was no confidential relation between appellant and appellee.

Appellant's contention that appellee stole its customer is completely refuted by the testimony of Mr. Reznick and Mr. Gunderson that Windsor wanted to continue buying doors from appellant, but that *appellant* refused to continue selling doors to Windsor because Windsor's accounts had not been paid. (See this Brief: Objections to Appellee's Statement of the Case, Point 5.) Appellee's contention that appellee entered into competition with appellant also has already been answered. (See this Brief: Argument, Point II.B.3.)

Equally fatal to appellant's argument is the fact that appellee did not divulge any of the information with respect to the design of the Panador to Windsor or

anyone else. Appellee's evidence established this fact and was not controverted. [Tr. pp. 20, 33, 36-37, 363.] In truth, appellant itself disclosed all of the information regarding the design of the sliding door at the time it placed it on sale to the public. The only act of appellee in question is that of using its existing dies to produce extrusions for Windsor. This is not wrongful unless Paragraph 11 is held applicable to this case, it not being claimed that appellee's act violated any custom or usage of the trade.

Although appellant has not set forth the facts of the cases cited in support of its argument, it is obvious from the opinion in each that they have no application to the case at bar. Unlike the situation presented on this appeal, each of cases relied upon by appellant concerned matters which clearly constituted trade secrets. In each, the process, product or formulae involved was in fact new, novel, unique and secret—and in most cases patented. In short, appellant's argument depends upon the existence of a trade secret, a fact not established in this case. As is stated in the Restatement of Torts, Section 757:

“The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in the industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be secret.”

Since the evidence demonstrated that the design of the sliding doors was neither patented nor different from many other sliding doors already on the market, it did not reach the stature of a trade secret. Prior to appellant's drawing, both the shape and design of the extrusions were publicly



known to the trade in general. Moreover, the extrusions themselves were non-unique, functional parts publicly known to the trade in general. As such, appellant did not have a protectable right in either the extrusions or the design of the extrusions, either before or after sale of the door to the public.

*Levine v. E. A. Johnson & Co.*, 107 Cal. App. 2d 322 (1951);

*Pagliero v. Wallace China Company*, 198 F. 2d 339, 342 (9th Cir., 1952);

*Aetna Bldg. Maintenance Co. v. West*, 39 Cal. 2d 198, 206 (1952);

*Continental Car-Na-Var Corp. v. Moseley*, 24 Cal. 2d 104 (1944);

*DeLuxe Box Lunch & Catering Co. v. Block*, 86 Cal. App. 2d 434 (1948).

#### D.

**Appellant's Fourth Argument for Reversal Is That: Confidential Relationship May Be Implied From the Acts of the Parties and No Express Agreement Need Be Made. (A. O. B. p. 28.)**

Appellant here argues that a confidential relationship may be implied from the acts of the parties and that no express agreement is necessary. With this there can be no argument. It does not follow, however, that a confidential relationship may be implied from the acts of the parties in this case.

The cases relied upon by appellant concern the same situation: Submission of the design of a patented product to another for the sole purpose of permitting him to decide whether he wishes to purchase the design. Admittedly, the fact that the product was patented is not controlling,

but it does establish without doubt that the design involved amounted to a trade secret. This is the crucial fact which is absent in the case at bar.

Appellee has not established the existence of a contract for sole and exclusive use of the dies, and no other facts have been established from which a confidential relationship can be seen to exist. Appellant's claim that it reposed confidence in appellee or that it relied upon appellee, even if proved, is not sufficient to establish a confidential relation. Appellee must have been shown to have voluntarily accepted or assumed the relationship of personal confidence with appellant.

*Ruhl v. Mott*, 120 Cal. 668, 679 (1898);

*Jackson v. Gorham*, 98 Cal. App. 112, 116 (1929);

*Meyer v. Zuber*, 92 Cal. App. 767, 772 (1928);

*Hausfelder v. Security-First National Bank*, 77 Cal. App. 2d 478, 482 (1946).

#### E.

**Appellant's Fifth Argument for Reversal Is That: The Public Sale of Articles Made in Accordance With Confidential Drawings Did Not Destroy the Confidential Relationship Between the Parties as to Such Drawings. (A. O. B. p. 30.)**

This argument of appellant is two-fold. The first phase is that (1) it would be a time-consuming, expensive, and laborious procedure to actually duplicate the dies and (2) therefore, if appellee had not used its existing dies, Windsor would have been *forced* to continue buying doors from appellant. In a small way, this argument is but a preview of the only point made by appellant in its sixth argument for reversal. It deserves, however, some attention at this time.

To establish the premise of this argument, appellant relies upon "a matter of judicial notice." The portion of the record quoted, consequently, must be read carefully in order to determine what was established. When this is done, it is apparent that all the trial court was willing to "assume" was that it would take time to make dies and get into production. Nothing is said, however, about how much time, and the only evidence in the record on this point completely refutes appellant's conclusion that had appellee not used its existing dies, Windsor would have been forced to continue to purchase doors from appellant. Mr. Grossman admitted that the doors "could be copied within the time it takes to make extrusion dies." [Tr. p. 155.] This only takes from one to three weeks. [Tr. p. 30.]

The second portion of appellant's fifth argument for reversal is that a sale of the product on the open market does not destroy the confidential character of the design or production information underlying the product. There are two answers to this argument.

First, the rule contended for assumes that the underlying design or production information is in itself a trade secret. As has been pointed out in answer to appellant's previous arguments, the evidence in this case fully supports the conclusion of the trial court that the extrusion designs here involved were not in fact trade secrets. (This Brief: III.C.)

Second, the rule contended for assumes that the underlying design or production information is not actually revealed to the public when the product alone is sold on the open market. This is the exact premise relied upon by

the court in *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12 (1889), cited by appellant at page 33 of its brief. The same is true of *Frank v. Wiltschek*, 209 F. 2d 493 (2nd Cir., 1953), also relied upon by appellant. This case concerned the process of compressing cloth into a small pellet so that when it was dropped into water it would unfold and form a washrag. The defendants in the case, during feigned negotiations to become salesmen for plaintiff, learned the process of manufacture, costs of production, capacity of the plant and the customers of plaintiff. Such information clearly constituted a trade secret and, more important, was not revealed to the public when the cloth pellets alone were sold on the open market. The court, therefore, properly restrained the defendants from using the information for their own profit. While a different product was involved, essentially the same situation was presented to the court in *Sketchley v. Lipkin*, 99 Cal. App. 2d 849 (1950).

The fact which distinguishes these cases from the one at bar is that here the design underlying the aluminum extrusions *was* revealed to the public by the mere sale of the door on the open market. Unlike the complicated pump involved in *Tabor v. Hoffman*, *supra* (which required a special design to compensate for heat changes), the shape, design and dimensions of the extrusions here involved were obvious from the extrusions themselves. Once the door was sold to the public, its shape, design and dimensions were no longer secret, even assuming that they were originally.

*Levine v. E. A. Johnson & Co.*, 107 Cal. App. 2d 322 (1951);

*Restatement of Torts*, Comment, Sec. 757.

F.

**Appellant's Sixth Argument for Reversal Is That: The Essence of the Wrong Done by Appellee Lay in Its Breach of Trust and Misuse of Confidential Information Submitted to It by Appellant for Its Own Profit. (A. O. B. p. 35.)**

Apart from the magnificent title of this argument, appellant's only point appears to be that appellee did not make drawings from the sample submitted to it by Windsor and thereby appellant suffered a "tremendous unfair advantage" since it had to wait from April 20, 1954 to October 1954, to obtain its first extrusions while Windsor was able to get them immediately. Here appellant reverts to the unjustified inference in an attempt to support its appeal.

In the first place, appellant did not have to wait from April 20, 1954 to October 1954, to obtain extrusions. Appellant points to Exhibit 1 [Tr. p. 39], but this only shows that the *final* shipment of extrusions was completed in October 1954. It was clear at the trial that the first shipments of extrusions occurred long prior to October 1954. [Tr. pp. 244-245.] Moreover, the time delay shown in Exhibit 1 for the other orders of appellant indicate that no substantial delay resulted from the necessity of making die drawings. The drawings themselves, in fact, are dated April 21, 1954, April 22, 1954 and April 26, 1954. [Tr. pp. 461-469.] This is a period of only 1, 2 and 6 days from the date of appellant's first order. More important in refuting appellant's argument is that Mr. Grossman admitted, on cross-examination, that the door could be copied within the time it takes to make extrusion dies. [Tr. p. 155.] This only takes from one to three weeks. [Tr. p. 30.]



G.

**Appellant's Final Argument for Reversal Is That: Appellee Unfairly Competed by Using Confidential Information to Alienate Appellant's Customer and to Engage in the Sale of Aluminum Sliding Door Parts of Appellant's Design in Competition With Appellant. (A. O. B. p. 37.)**

This argument of appellee is not only its last but also its most cavalier. It assumes as established almost every fact which was in issue in the court below and which was there decided adversely to appellant. The only statement in this argument which is true is the following: One of appellee's defenses to appellant's cause of action for unfair competition was that appellee did not compete with appellee. Appellee's contentions in this regard have already been set forth in Part II.B.3. of this Brief. The statement that appellee sold to "appellant's customer" also has been refuted in this Brief in Point 5 of Appellee's Objections to Appellant's Statement of the Case where it was shown that Windsor's customer relationship with appellant was severed *by appellant* prior to the time appellee sold extrusions to Windsor.

The real vice of appellant's argument is that it attempts to classify appellee's alleged wrong as "unfair competition." The evidence only showed that appellee manufactured extrusions for use in sliding doors and was in fact the source of extrusions for both appellant and its competitors. Appellee did not compete with either appellant or any of its competitors in the assembly or sale of finished sliding doors. Unfair competition cannot exist

unless there is actual competition, and that cannot exist in the absence of some competing commodity or person.

*Scutt v. Bassett*, 86 Cal. App. 2d 373, 376 (1948);

*Canister Co. v. Owens-Illinois Glass*, 95 F. 2d 303, 304 (3rd Cir., 1938).

Even if competition exists, however, it is not unfair unless appellant's acts were calculated to deceive or confuse the general public with respect to the source of the product involved. Here, of course, the elements of "palming-off" and "secondary meaning" are essential.

*Italian Swiss Colony v. Italian Vinyard Co.*, 158 Cal. 252, 255-256 (1910);

*Excelsior Milling Co. v. Taylor Milling Co.*, 43 Cal. App. 591, 594 (1919);

*Restatement of Torts*, Secs. 712, 741, 742.

The elements of palming-off and secondary meaning are not involved in this case. [Tr. pp. 69, 73, 78, 422, 425.] Accordingly, the doctrine of unfair competition has no application here. The two cases cited by appellant are not in point for the same reason. Each involves the aspect of "confusion in the public mind," a fact which is not present in the case at bar.

### Conclusion.

Each of the arguments made by appellee for reversal of the judgment entered below depend upon circumstances which have little or no support in the record and which in fact were resolved against appellant by the trial court. Consequently, appellant's arguments, denominated "matters of law," are in reality merely arguments of the evidence and the facts and inferences to be drawn therefrom. After a full and complete trial, the District Court con-

cluded that the design of the extrusions did not constitute a trade secret, that there was no confidential relation between appellant and appellee, and that appellee did not unfairly compete with appellant. Admittedly some of the evidence is conflicting, but there is substantial evidence in the record on appeal to support each of the conclusions of the trial court.

Apart from the legal considerations here presented, it is difficult to conceive of any equitable basis for appellant's claim. Appellant was in a very competitive business selling a non-patented, non-unique product. Because of appellant's own refusal to continue to sell to Windsor, Windsor decided to manufacture its own door. This Windsor had a right to do. In the ordinary course of its business and that of appellee's, Windsor placed an order with appellee for several different aluminum products. Among the products ordered were extrusions for a sliding door. The design of the desired extrusions was given to appellee by Windsor in the form of a sample. There was no collusion between appellee and Windsor as against appellant, it appearing in fact that the Windsor order was handled by sales personnel of appellee who had no connection whatsoever with appellant's orders. When the sample was submitted to appellee's engineering department, it was discovered for the first time that appellee already had dies on hand which would make the desired extrusions. Following its normal procedure in the case of non-unique, non-patented and non-secret products, appellee used its existing dies to make the required extrusions. From these facts appellant argues that appellee's acts permitted Windsor "to avoid purchasing doors from appellant." This argument is unjustified.

For the reasons and upon the grounds hereinabove set forth, appellee respectfully urges this Honorable Court to affirm the judgment of the District Court.

Respectfully submitted,

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